American Bar Association Journal

November 1951

VOLUME 37 NUMBER 11

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Contents

NOVEMBER, 1951

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The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect so far as possible, the objectives of the organized Bar of the United States.

There are sixteen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trade-Mark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of thirty-six, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

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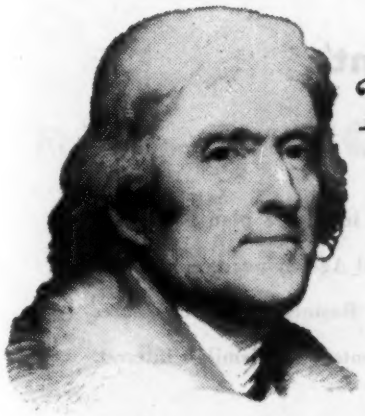

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Pursuant to terms of bequest of
Judge Erskine M. Ross, deceased.

INFORMATION FOR CONTESTANTS

Time When Essay Must Be Submitted:
On or before April 1, 1952.

Amount of Prize:
Twenty-five Hundred Dollars.

Subject To Be Discussed:
"The Function of Concurring and Dissenting Opinions in Courts of Last Resort."

Eligibility:
The Contest will be open to all members of the Association in good standing, including new members elected prior to March 1, 1952 (except previous winners, members of the Board of Governors, Officers and employees of the Association), who have paid their annual dues to the Association for the current fiscal year in which the essay is to be submitted.

No essay will be accepted unless prepared for this Contest and not previously published. Each entryman will be required to assign to the Association all right, title and interest in the essay submitted.

Instructions:
All necessary instructions and complete information with respect to number of words, number of copies, footnotes, citations, and means of identification, may be secured, upon request, from the Executive Secretary of the Association.

AMERICAN BAR ASSOCIATION

1140 North Dearborn Street Chicago 10, Illinois

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1. The names and addresses of the publisher, editor, managing editor, and business managers are:

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Managing editor, There is none.

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TAPPAN GREGORY

Sworn to and subscribed before me this 18th day of October, 1951.

(Seal) ELEANOR MUELLER

(My commission expires November 8, 1951.)

Advocacy Before the Supreme Court:

Suggestions for Effective Case Presentations

by **Robert H. Jackson** • Associate Justice of the Supreme Court of the United States

■ The art of advocacy is both exacting and inspiring. In this article, Mr. Justice Jackson gives many helpful suggestions on the preparation of cases to be orally argued before the Supreme Court. Among other matters, he discusses the importance of oral argument, selection of counsel, the order and progression of argument, questions from the bench, and proper attire. Justice Jackson's article is taken from a lecture he delivered, under the auspices of the Alexander F. Morrison Lecture Foundation, before the State Bar of California, August 23, 1951, in San Francisco, California.

■ More than ten years ago, John W. Davis, in a wise and stimulating lecture on "The Argument of an Appeal", shared with our profession the lessons of his own rich experience. He suggested, however, that such a lecture should come from a judge—from one who is to be persuaded, rather than from an advocate. With characteristic felicity, he said: "Who would listen to a fisherman's weary discourse on fly-casting . . . if the fish himself could be induced to give his views on the most effective method of approach?"[1] I cannot add to the available learning on this subject.[2] I can only offer some meditations by one of the fish.

Let me confess that, when dangling bait before judges, I have not always practiced what I now preach. Many lessons that I pass on to you were learned the hard way in the years when I was intensively occupied with presentation of government litigations to the Court. And if I appear to overrate trifles, remember that a multitude of small perfections helps to set mastery of the art of advocacy apart from its counterfeit—mere forensic fluency.

Importance of Oral Argument Is Decisive

Lawyers sometimes question the value of the relatively short oral argument permitted in the Nation's highest Court. They ask whether it is not a vestigial formality with little effect on the result. In earlier times, with few cases on its docket, the Court could and did hear arguments that lasted for days, from such advocates as Webster, Pinkney, and Luther Martin. Over the years the time allotted for hearing has been shortened, but its importance has not diminished. The significance of the trend is that the shorter the time, the more precious is each minute.

I think the Justices would answer unanimously that now, as traditionally, they rely heavily on oral presentations. Most of them form at least a tentative conclusion from it in a large percentage of the cases. This is not to say that decisions are wholly at the peril of first impressions. Indeed, deliberation never ceases and there is no final commitment until decision actually is announced. It is a common experience that a Justice is assigned to write an opinion for the Court in accordance with a view he expressed in conference, only to find from more intensive study that it was mistaken. In such circumstances, an inadequate argument would have lost the case, except that the writing Justice rescues it. Even then, his change of position may not always be persuasive with his colleagues and loss of a single vote may be decisive. The Bar must make its preparations for oral argument on the principle that it always is of the highest, and often of controlling, importance.

Who Should Present the Argument?

If my experiences at the bar and on the bench unite in dictating one imperative, it is: Never divide between two or more counsel the argument

1. Davis, "The Argument of an Appeal", 26 *A.B.A.J.* 895; December, 1940.

2. In addition to the lecture in note 1, the students of the subject should see Birkett, "The Art of Advocacy", 34 *A.B.A.J.* 4, January, 1948; Birkett, "Law and Literature—The Equipment of the Lawyer", 36 *A.B.A.J.* 891, November, 1950. Wiener, *Effective Appellate Advocacy* (Prentice-Hall, 1950) is a comprehensive and instructive text on appellate advocacy in general, but with especial reference to the United States Supreme Court. Stern and Gressman, *Supreme Court Practice* (Bureau of National Affairs, 1950), devote a chapter to "Oral Argument", in which perplexed counsel will find detailed guidance.

on behalf of a single interest. Sometimes conflicting interests are joined on one side and division is compelled, but otherwise it should not be risked.

When two lawyers undertake to share a single presentation, their two arguments at best will be somewhat overlapping, repetitious and incomplete and, at worst, contradictory, inconsistent and confusing. I recall one misadventure in division in which I was to open the case and expound the statute involved, while counsel for a government agency was to follow and explain the agency's regulations. This seemed a natural place to sunder the argument. But the Court perversely refused to honor the division. So long as I was on my feet, the Justices were intensely interested in the regulations, which I had not expected to discuss. By the time my associate took over, they had developed a lively interest in the statute, which was not his part of the case. No counsel should be permitted to take the floor in any case who is not willing to master and able to present every aspect of it. If I had my way, the Court rules would permit only one counsel to argue for a single interest. But while my colleagues think such a rule would be too drastic, I think they all agree that an argument almost invariably is less helpful to us for being parceled out to several counsel.

Selection of leading counsel often receives a consideration after the case arrives at the high Court that would have been more rewarding before the trial. But when the case is docketed in the Supreme Court, the question is, shall counsel who conducted the case below conduct its final review? If not, who shall be brought in?

Convincing presentations often are made by little-known lawyers who have lived with the case through all courts. However, some lawyers, effective in trial work, are not temperamentally adapted to less dramatic appellate work. And sometimes the trial lawyer cannot forego bickering over petty issues which are no longer relevant to aspects of the case reviewable by the Supreme Court. When the trial attorney lacks dispassionate judgment as to what is important on appeal, a fresh and detached mind is likely to be more effective.

No lawyer, otherwise fairly equipped for his profession, need hesitate to argue his own case in the Supreme Court merely because he has not appeared in that Court before. If he will conform his argument to the nature of its review and his preparation to the habits of the Court, he has some advantages over a lawyer brought in at that late stage. Sometimes even his handicap will work out to his advantage. Some years ago, a country lawyer arguing a tax case gleaned from baffling questions from the bench that his case was not going well. He closed by saying, "I hope you will agree with me, because if you don't, I certainly am in wrong with my best client." Such a plea is not enough to win a decision, but its realism would assure a most sympathetic hearing from any judge who can still remember what it is to face and explain to a defeated client.

Many litigants, and not a few lawyers, think it is some advantage to have their case sponsored by a widely known legal reputation. If such counsel is selected because of his professional qualifications, I have nothing to say against that. Experience before the Supreme Court is valuable, as is experience in any art. One who is at ease in its presence, familiar with its practice, and aware of its more recent decisions and divisions, holds some advantage over the stranger to such matters. But it is a grave mistake to choose counsel for some supposed influence or the enchantment of political reputation, and, above all, avoid the lawyer who thinks he is so impressively eminent that he need give no time to preparation except while he is on a plane going to Washington. Believe me when I say that what impresses the Court is a lawyer's argument, not his eminence.

On your first appearance before the Court, do not waste your time or ours telling us so. We are likely to discover for ourselves that you are a novice but will think none the less of you for it. Every famous lawyer had his first day at our bar, and perhaps a sad one. It is not ingratiating to tell us you think it is an overwhelming honor to appear, for we think of the case as the important thing before us, not the counsel. Some attorneys use time to thank us for granting the review, or for listening to their argument. Those are not intended as favors and it is good taste to accept them as routine performance of duty. Be respectful, of course, but also be self-respectful, and neither disparage yourself nor flatter the Justices. We think well enough of ourselves already.

The time may come when you will be sought out to argue a case for other lawyers. In that event, you should consider whether it is not due yourself to insist on full responsibility for its presentation. Divided command is as disastrous to a litigation as to a military campaign. Either you will be in control of the litigation or someone else will be in control of your professional reputation. Some of the wisest leaders of the Bar decline to participate in a case, even with most amiable and reputable associates, unless they are given undivided command.

The claim recently was given publicity that leading members of the Bar refused professional employment in support of the Communist challenge to the constitutionality of the Smith Act. Every accused person has a constitutional right to counsel and there is a correlative duty on the part of the Bar to see that every accused, no matter how unpopular, is represented competently. In addition to this sense of duty, many eminent lawyers would welcome the professional challenge involved in that case. Knowing this, I examined with care the allegations filed in the Supreme Court that the Communists could not get counsel. They did not disclose that any so-called leader of the Bar had been asked, or would be allowed, to assume full responsibility

for argument of the case. The most that appeared was that they were asked to associate themselves with attorneys who were in control of it and whose conduct of it already had resulted in a sentence for contempt. No American lawyer is under a duty to become the tail to another lawyer's kite, or to submit himself to control of counsel or clients whose tactics in the case he does not approve. No lawyer becomes too eminent to consult and co-operate with other members of our brotherhood, but those who, by a lifetime of hard work and fair dealing, earn enviable reputations at the bar rightly reject any employment that will impair that independence of judgment and freedom of action which becomes an officer of the Court. He is not obliged to become anyone's mere hired hand.

Selection of Questions Is Test of Discriminating Advocate

One of the first tests of a discriminating advocate is to select the question, or questions, that he will present orally. Legal contentions, like the currency, depreciate through overissue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one. Of course, I have not forgotten the reluctance with which a lawyer abandons even the weakest point lest it prove alluring to the same kind of judge. But experience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one.

If you are called in after assignments of error have been filed, or feel impelled to raise many in your brief, at least forego oral argument of all but one or two. The impact of oral presentation will be strengthened if it is concentrated on a few points that can be simply and convincingly stated and easily grasped and retained.

The successful advocate will recognize that there is some weakness in his case and will squarely and candidly meet it. If he lost in the court below and needs appellate relief, that fact alone strongly suggests some defect in his position. If he is responding to a writ of certiorari, he should realize that several Justices have been tentatively impressed that the judgment below is dubious or in conflict with that of other courts, otherwise certiorari would not have been granted. The petitioner should never dodge or delay but give priority to answering the reasons why he lost below. The respondent should ask himself what doubts probably brought the case up and answer them. Each will then be covering the questions that the Justices are waiting to hear answered. To delay meeting these issues is improvident; to attempt evasion of them is fatal.

The order and progression of an argument are important to its ready comprehension, but in the Supreme Court these are not wholly within the lawyer's control. It is difficult to please nine different minds, and it is a common experience that questions upset the plan of argument before the lawyer has fairly started. I used to say that, as Solicitor General, I made three arguments of every case. First came the one that I planned—as I thought, logical, coherent, complete. Second was the one actually presented—interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night.

Justices Are Much Given To Interrogation of Counsel

I can offer no formula that will guarantee unbroken argument, for the Supreme Court is much given to interrogation. Perhaps the opening argument will have the best chance for an uninterrupted interlude if counsel will begin with a concise history of the case, state the holding of the court below and wherein it is challenged. He should follow with a careful statement of important facts, and conclude with discussion of the law. Argument for a respondent is more variable. Sometimes it may be necessary to restate the case and establish justification for the decision below. At other times it may be more effective to strike a few selected weak spots in appellant's attack upon the judgment.

ROBERT H. JACKSON

Most Contentions of Law Are Won or Lost on Facts

For whichever side he appears, the choice of his materials and arrangement of its sequence will test the skill of the most experienced craftsman. The purpose of a hearing is that the Court may learn what it does not know, and it knows least about the facts. It may sound paradoxical, but most contentions of law are won or lost on the facts. The facts often incline a judge to one side or the other. A large part of the time of conference is given to discussion of facts, to determine under what rule of law they fall. Dissents are not usually rooted in disagreement as to a rule of law but as to whether the facts warrant its application. Sometimes facts are best unfolded chronologically, and at other times it will be more effective to assemble them about particular topics. The presentation is sometimes aided by maps and charts, which counsel is at liberty to use. Courage to drop irrelevant or unimportant details and to avoid becoming entangled in interesting or hotly

contested questions which do not go to the result is an aid to clarity.

Counsel must remember that the function of the Supreme Court is to decide only questions of law. If the appellant, or petitioner, attempts, or so puts his facts that he appears to be attempting, to reargue a verdict or findings of fact, he will meet with an embarrassing judicial impatience. Both sides should strive so to present the questions of law that it will be clear they are not depending upon a reweighing of conflicting evidence.

Oral argument may be simplified by integration with the brief. Some issues are technical and must be resolved by study of exact language in statutes, patent claims, or the like. Such precision is more readily communicated if the eye of the judge is called to the aid of his ear. Some counsel meet this problem by making a brief general statement of their ultimate contention and requesting the Court to consult the brief for the close analysis in its support. Others fully expound their contention orally, reading the decisive language, requesting the Justices to follow it for themselves, and pointing out the page in the record or briefs where it is to be found.

In discussing questions of law, the advocate must sometimes hazard a guess as to how much of the law applicable to his case the judges already know. He is too polite—and discreet—to enter upon a long legal exposition that will insinuate a lack of judicial acquaintance with elementary propositions. On the other hand, it is his duty not to risk omission of the many matters that judges are presumed to know but often do not.

It does not seem to me safe ever to assume that a judge is able to recall exact words of a statute or a document, even if he is known to be familiar with its general terms. Statutory language is artificial, elusive and difficult to carry in mind. Dates, relationships to the case of persons named, and other details escape memory.

But I should make the contrary assumption about the Court's own precedents, particularly its recent precedents. I can think of no more dismal and fruitless use of time than to recite case after case, with explanations why each is, or is not, applicable. If the authority for your contention is a decision, of course you must make clear its meaning and application. But if the one or two best precedents will not convince, a score of weaker ones will only reveal the weakness of your argument. I always look with suspicion upon a proposition with a page full of citations in its support. And if the first decision cited does not support it, I conclude the lawyer has a blunderbuss mind and rely on him no further.

It would surprise you to know how frequently counsel undertake to expound a recent decision to the very men who made it. If the exposition is accurate, it adds nothing to the Court's knowledge and if it is not, it discredits counsel's perception or fairness. My advice is to presume judicial familiarity with recent decisions, accept them at full face value and read nothing more into them, and thereby avoid entanglement in any disagreements that may have occurred within the Court when they were written.

Now and then a lawyer invokes or quotes a dissent in aid of his cause. By identifying his contention with a recent dissent, he may close some minds to the rest of his argument. Of course, majority decisions are sometimes overruled and dissents become the law, but usually after considerable time has elapsed. If the overruling of a decision is all that will save you, go about asking it directly and candidly. But if your case can be supported by Court decisions, it will not be wise to confound it with even a good quotation from a dissent. Sometimes counsel is confronted with the dilemma of inconsistent lines of authority where the Court has recently overruled its own not-very-old decision. In such cases, the sitting Justices are apt to be sharply divided as to which rule will apply to slightly varied facts. I have no advice to offer in this situation—you will just have to get out of that dilemma by your own wit.

Whether one will invoke extrajudicial writings or speeches of a sitting judge is a matter of taste—usually, I may say, of bad taste. I do not recall any instance in which it helped. A collegiate court entertains as many different views as it has colleagues. Individual expressions, such, for instance, as this lecture, may or may not accord with the views of other Justices, and reliance upon controversial writings of one Justice may alienate others. But if an individual judge is to be quoted, by all means let it be in matter-of-fact fashion and without tossing compliments to the writer, for nothing depreciates one's position more certainly and quickly than to fawn upon one of the judges whom he appears to think he can capture by flattery, and nothing is less welcome to the judge.

Regard for his professional standing will deter the lawyer from intentional misleading, but it is twice prudent not to quote out of context or ascribe a strained meaning to writings of a sitting judge. I have been, and I have seen other Justices, indignant at the distortion of some writing. It is hard to retrieve the confidence forfeited by seeking such an advantage.

The rules permit opening counsel, after making a fair opening, to reserve time for rebuttal. I would not say that rebuttal is never to be indulged. At times it supplies important and definite corrections. But the most experienced advocates make least use of the privilege. Many inexperienced ones get into trouble by attempting to renew the principal argument. One who returns to his feet exposes himself to an accumulation of questions. Cases have been lost that, before counsel undertook a long rebuttal, appeared to be won.

Aids to Delivery of the Argument Are Widely Varied

The manner of delivery must express the talents and habits of the advocate. No one method is indis-

(Continued on page 861)

Educating Lawyers for a Changing World:

A Challenge to Our Law Schools

by **Erwin N. Griswold** • Dean of the Harvard Law School

■ Last month's *Journal* carried an abbreviated version of a report on the law curriculum at Yale written by the Committee on the Law School of the Yale University Council. That report placed great stress on the need for training lawyers to understand the broad economic, social and political issues of the twentieth century. This article by Dean Griswold, taken from an address delivered at the dedication of the Southwestern Legal Center at Dallas last spring, deals with the same problem, and shows the thinking of the leader of another distinguished law school about a problem that both schools realize must be solved if the next generation of the legal profession is to be ready to continue its leadership in our country.

■ Legal education in this country, in any modern sense, is only about eighty years old. The Association of American Law Schools has recently had its fiftieth birthday.

During this period there have been many changes and developments in the law schools and in law teaching. The program of instruction of the schools of eighty years ago, or fifty years ago, or even twenty-five years ago is materially changed today. Much of the older subject matter is still found in the first year courses and the second year courses of today. But a large part of the work done now in the latter half of the law school curriculum was not taught and, to a surprising extent, not even seriously thought of, even a generation ago.

These changes reflect not merely growth and development in our law and society, but also, I believe, a marked change in the nature of the work done by lawyers, or at least by many lawyers. At an earlier date by far the largest part of the activities of a busy lawyer was in the preparation and trial of cases in court and in family counseling, usually with respect to real estate or other property transactions, such as wills and trusts. For the past fifty years, first in the big cities and then in other active law offices, the work has more and more involved matters of business counseling. Sometimes lawyers have given up their practices and have become businessmen. But more often they have continued to function as lawyers, giving advice on many types of problems to their business clients. During the same period many lawyers have been called into public service of one sort or another for an important portion of their careers. The law schools have had no alternative but to devote much more of their time to problems of public law, labor law, administrative law, securities legislation, government regulation of business, including antitrust law, and taxation, to mention only some of the newer fields.

Newer Fields Are Different

For a generation the law schools have been trying to learn how to teach these subjects. They had a good background for this problem in the methods that had been developed for the older subjects like torts and contracts. But the newer fields are different in many ways. They are largely statutory, so that they cannot be dealt with satisfactorily or appropriately by a purely case method. They change and develop rapidly, so that a painstaking point by point approach which seeks to uncover an underlying thread of consistent doctrine or analysis is hardly applicable. In many ways the newer subjects are more demanding of law teachers. They cannot be handled satisfactorily by burying oneself in the cloisters. One cannot become a great scholar by accumulating notes. Even more than in the older courses, what must be sought is understanding of processes and social and economic forces and factors rather than specific content—although the content can by no means be ignored.

Although the law schools lagged in meeting some of these problems, their lag was, on the whole, I am inclined to believe, rather less than that of most of the rest of the profession.

Over the past fifteen years the schools have made great progress in developing their work and methods. I am by no means smug about what we have done. We must always keep working at the task of improving our teaching job. It is my thesis today, however, that the time has come for our law schools, or some of them, to take on new tasks.

There Is Much Work To Be Done in Legal Field

There is so much work to be done in the legal field. Our knowledge of the facts underlying most problems of legal relations is sketchy in the extreme, or nonexistent. Much of our legislation is piecemeal and haphazard—surprisingly good, as a matter of fact, when it is recalled that it is for the most part drafted by part-time legislators with little or no staff assistance, and usually no real opportunity for detailed or long range study. Even some of our oldest legislative matters, such as the statute of limitations, for example, have never received comprehensive examination or re-examination. In many states the procedure is ancient and outmoded. In others much of the structure of the criminal law and the penal system is in need of revision and re-evaluation. I mention these only as illustrations of the possibilities. I could go on—referring, among other things, to the problems of justice for the poor and more adequate legal service for persons of moderate means.

Much of this needed work cannot be done effectively by lawyers in active practice, though their aid and counsel will be invaluable and necessary in dealing with many of the problems. Indeed, much of the knowledge to be gained lies in the day-to-day experience of the Bar. In the rapidly growing areas of the law, the law offices are likely to be better sources of knowledge than the judicial reports. But practicing lawyers have their problems, too. They have their living to make. They have their clients to serve. Many of them are very generous in devoting large portions of their time and energy to public causes. But it is unrealistic to expect that busy practitioners on a part-time basis can themselves do all the things that need to be done. This is a task, I think, to which the law schools can make a major contribution. Indeed, unless the law schools make this one of their jobs, I suspect it may suffer the fate of everybody's business and remain undone.

Law Schools Should Become Centers of Research

The challenge which I think is being put to the law schools by our times is that, in addition to being effective teaching agencies, they should become, on a scale far greater than has heretofore been the case, centers for the carrying on of research into the law and its development and its application to the solution of current problems encountered in the adjustment of human relations. This is the field of the law and the lawyer. Within the legal profession, it is, I believe, peculiarly the opportunity of the law schools to meet this need.

But, you will say, the law schools have long been centers of research. For many years, following the example of the great Supreme Court Justice, Joseph Story, law professors have been turning out great streams of books and articles which have contributed to our knowledge of the law and of its place in society. In modern times there have been the great works of Williston and Scott and Wigmore, to mention only a few. And there are now some seventy-five law reviews, turning out altogether far more material than any person can possibly read or digest. Why do I talk about more legal research when we already have so much?

That is an appropriate question, but I think it can be readily answered. We need much legal research of a sort far different from most that has been carried on heretofore. Much of the legal research of the past has been largely solitary work, a library task done by individual scholars—occasionally with some help, but usually not much. Out of this work has come great benefits. Through the great treatises and similar work, much of the common law has been systematized. Many reforms and improvements have resulted, as well as a better understanding of the law for practitioners, judges and students. It has been a fine job. But it is not enough.

We have become accustomed to our scientific schools and our medical schools being great centers of research. In many of these schools, teaching as such has become a secondary activity. Far more of the personnel are engaged in research activities than in teaching. But, interestingly enough and important for our purposes, the research activities contribute directly and inevitably to the teaching. The findings of the research become available for teaching. The students can often engage directly in the research activities, especially the more advanced students, and can derive great educational benefits from such work. We should not think of a medical school or a physics department as great unless it was carrying on extensive research activities. Why should the situation be any different at a law school? Can it be said that the problems of the adjustment of human relations, with which the law deals, are any less important or any less difficult than those which are dealt with in the natural sciences?

The job that has been done so far by the natural scientists is one of the easier jobs to be done in the field of human knowledge. I do not for a moment want to minimize the achievements of the great scholars and doers in these fields. They have been magnificent. But I do want to suggest that these achievements have been made in what is probably, on a relative basis, a rather simple area of human knowledge. Natural science deals with phenomena that are observable and measurable with reasonable accuracy. It deals with a finite number of variables, usually a very small number. Its hypotheses lend themselves to ready mathematical statement and to verification by experiment that can be conducted in a relatively short interval of time

with practically every element closely controlled.

Problems of Social Science Are Vastly More Complex

By contrast, the problems of the so-called social sciences, the problems of the adjustment of human relations in society, are vastly more complex. There are an almost unlimited number of variables. Many of them are difficult or, so far, impossible to isolate, observe and measure. Little mathematics has yet been developed that is adapted to stating and analyzing these problems. Yet, the problems seem clearly more important to mankind, at this stage of its history, than anything which remains on the agenda of natural science. The basic problem now confronting society is whether it will be able to control the forces that science has developed. This involves baffling questions of human nature, psychology, economics, political science, law and other fields which we have hardly begun to explore. We have been working at these questions long and hard, but before you smile at our relatively small achievement, let me assert again that they are more difficult, or have so far seemed to be more difficult, than those of the natural sciences.

The results of our efforts to date are surely rather slight and disappointing. But here, even as in the natural sciences, we must not expect perfection and we can and must do much with less while we are developing our knowledge towards a greater understanding and control of human relationships.

Social Sciences Are Beginning To Make Progress in Research

The social sciences are now in some ways at about the point where the natural sciences were a century or so ago. In the seventeenth and eighteenth centuries, the social sciences, particularly government and law, made great progress, relatively speaking. That was the age of the rise of Parliament, of the Bill of Rights, of the American Revolution, of Rousseau and Paine and Jefferson. During this period men in the English-speaking world progressed far on the path to freedom.

Until about a century ago, the natural sciences were largely developed by men acting alone and with little in the way of equipment or support. Benjamin Franklin, Boyle, Lavoisier were not financed by endowments or grants from industrial firms. A few colleges had professors of physics or chemistry. They worked by themselves, occasionally making a bit of progress. They were on the threshold of great discoveries, but they could hardly know this fact. Galvani did not foresee radio, and Farraday had no conception of a 50,000 kilowatt generator. As the discoveries of scientists accumulated, their support increased and their numbers multiplied. The natural result was great production in the field, with consequent great increase in the facilities and the problems of mankind.

Analogy to Natural Sciences Should Not Be Pushed Too Far

Of course, I cannot foresee the next hundred years, any more than the men of a hundred years ago could discern the developments of the past century. I cannot tell you in what direction developments may come, nor the means by which they will be produced. I cannot even tell you, except in the most general terms, what are the problems to be solved. Surely the analogy to the natural sciences should not be pushed too far, for progress in the problems of human relations will require the development of new approaches and methods. This much does seem clear. We shall not make progress in this supremely important field of adjusting human relations unless we work at it intensively. And I have the feeling that we can and shall make significant progress if we devote to these problems the same sort of intellectual energy and talent and resources which has been devoted to the natural sciences in the past hundred years. We should not forget that there were many centuries when men must have looked at the plague and smallpox, at slow communication and difficult transport, at heavy manual labor and household drudgery with the same feeling of resignation and inevitability with which they may now sometimes regard the problems of crime and civil controversy, or international relations and war.

ERWIN N. GRISWOLD

Attack on Problems Is Difficult and Complicated

The attack on these problems is a complicated and difficult assignment. Significant progress in the field may well require support and stimulus and encouragement far greater than have been devoted to the natural sciences in the past century. We shall have to be vouchsafed some geniuses. But experience gives room to hope that they will come if we can prepare the ground for them, just as Maxwell and Gibbs and others appeared on the scientific scene. Results can be no more guaranteed than they could be in science a hundred years ago. But there can be no doubt of the world's need and little doubt that the need cannot be met unless we pour tremendous energy and resources into the task.

Perhaps I speak from a biased point of view, but it seems to me that the time has come when we should greatly extend our efforts in this area. We should have more extensive and better organized support which

will make it possible to accumulate knowledge in many fields of human relations such as anthropology, social psychology, economics and law. Difficult as the problems in these areas surely are, can it be said with any positiveness that they are any more remote, any more unsolvable, than was the problem of the structure of the atom a century ago? Is there any reason to think that they will not yield significantly to the properly directed efforts of many human minds?

One of the things that will have to be understood is that this task will require large sums of money. There is little conception yet of the inevitable high costs of research in this field. Many of the tasks that need doing require extensive work in the field. They require team work, often involving the collaborative effort of persons trained in many different fields of endeavor. They cannot be done effectively on a part-time basis or in a short period of time. We think little of putting $10,000,000 or more into a cyclotron, while my school has for years had extreme difficulty in raising $25,000 a year to cover the costs of a remarkable and productive basic research into the causes of juvenile delinquency and the effectiveness of present methods of dealing with that vastly important problem.

There is another figure which I rather enjoy quoting. The school with which I am associated is perhaps as well financed as any law school in the country. Yet the Law School's portion of the total endowment of Harvard University is about 3 per cent. And at the present time the Harvard Medical School spends seven times as much per student each year as the Harvard Law School. I expect that a very similar relation exists elsewhere. I mention this fact without any thought at all that the expenditure for medical education and research is excessive—far from it. My point is that up to now it seems to me very clear that legal education and research in the fields of law and related social sciences have been starved financially. We cannot expect to achieve the results we need until greater support for this work is provided. And, of course, we cannot hope for such support unless and until we in the law schools initiate worthwhile projects that will command the interest of the profession and the community.

Research Activities May Produce Better Teaching

Out of such research activities will come many developments of direct use in teaching. The medical school with extensive research activities is clearly a better teaching medical school. In addition, research activities of the sort I have in mind will necessarily contribute greatly to the practicing members of the legal profession, just as the research activities of the medical schools today contribute constantly to the effectiveness and the knowledge of the members of the medical profession.

Already many law schools are recognizing that they have a great obligation to the practicing members of the Bar and a great opportunity in contributing to them. The development of Forums and Institutes for practicing lawyers has done much to keep the Bar informed and alert to new problems and developments. I hope that this work will continue and increase. It should be an essential and important part of any program of effective legal research in a law school.

Among the subjects on which I hope that we will devote great time and effort in the field of legal research is that of the legal problems involved in international relations. This would cover such things as the private law problems encountered in foreign trade and investment, on the one hand, and the public law problems involved in world organization, on the other. Even in this crucially important field, our basic knowledge today can hardly be regarded as more than rudimentary.

If we are enabled to carry out these tasks of effective legal research, we must not expect too much and too soon. We are going to have to develop new techniques of research—methods that will enable the investigator to get at the real heart of the problems and not simply to multiply strata of footnotes or heap up mountains of statistics. Moreover, in this field of human relations, even more than in the natural sciences, we shall not find final answers to all questions. But final answers are not necessary to progress, as the development of natural science clearly shows. Effective results may be produced with knowledge that is incomplete. The telephone was in daily use while Hertzian waves were still equations in Maxwell's book.

There is a challenge to our law schools. Nowhere has more been done to recognize that challenge than at the Southwestern Legal Foundation. I salute Dean Storey and all of those who have had the vision here and have helped to make this development possible. But this, and all that you have done, is only a start. For the sake of all of us, I hope that you, and many others, can go on much farther.

Committee on Law Lists

■ On September 15, 1951, the Standing Committee on Law Lists issued a certificate to the Legal Directories Publishing Company, 1072 Gayley Avenue, Los Angeles 24, California, for the 1951 Edition of the Florida-Georgia Legal Directory.

The Totalitarianism of Mr. Justice Holmes: Another Chapter in the Controversy

by **Ben W. Palmer** • of the Minnesota Bar (Minneapolis)

■ The debate between the adherents of the natural law and the advocates of positive law is perennial. Much of the controversy has centered about the legal philosophy of Justice Holmes, who has perhaps become the best-known and most beloved jurist in American history. Holmes the man and judge is universally admired, but Holmes the philosopher has been the object of much criticism. Mr. Palmer, who has been one of the leaders of the party attacking Holmes' skepticism and disbelief in an absolute moral law, answers two of Holmes' defenders in this article.

■ The bludgeon or shillelagh has now been added to the rapier in the current controversy about Holmes v. the Natural Law. In 1942 John C. Ford, S. J., carefully distinguishing Holmes the "polished and sympathetic gentleman", and Holmes the "irreproachable judge" from the philospher of law, pointed out and documented his proof that the philosophy of Holmes was totalitarian.[1] In the same year Francis E. Lucey, S. J., Regent of Georgetown University School of Law, developing an address given by him to the Association of American Law Schools, carried the argument further with extensive quotations from the work of the Yankee from Olympus. This was in an article entitled "Natural Law and American Legal Realism".[2] Other writers continued the criticism of Holmes' philosophy as part of the revival of natural law in the Western world.[3] These men wrote with objectivity and without resort to insinuation or personalities and distinguished Holmes the man from his philosophy with all the punctilio of the duello.

And then Westbrook Pegler entered the fray.

To him the Magnificent Yankee was merely a "cynical and senile brutalitarian" who held that "force alone was the supreme law of civilization"[4] and "had no more morals than a pig". This aroused the ire of the two admirers of Holmes, Professor Mark DeWolfe Howe, of the Harvard Law School, one of Holmes' former secretaries, and Fred Rodell, of the Yale Law School.

Professor Howe writes under the rather pretentious title "The Positivism of Mr. Justice Holmes".[5] The article contains some interesting material on Holmes' pre-judicial career and some acute observations but the careful reader is disappointed after reading the thunderous index to find out that most of the professor's writing is devoted to elaborating a single point of narrow scope and to setting up a straw man to knock him down.

At the beginning of his article, after referring to criticisms of the philosophy of Holmes by Fathers Ford and Lucey and by this writer, Professor Howe gets the reader to put down his guard by filing a caveat. "It is not my purpose to deal with these particular efforts to persuade the American people that the philosophy of Holmes was repugnant to the principles of American civilization." He then adds: "The criticism of Fathers Ford and Lucey, popularized by Mr. Palmer and perverted by Mr. Pegler, is so firmly grounded in the Catholic philosophy of law that were I to attempt to meet it directly I should find myself quickly engaged in a theological controversy beyond my competence to discuss."

Attempt To Ignore Natural Law Will Not Succeed

This attempt to brush aside philosophical criticisms of Holmes' position and stem the tide of the revival of natural law as a defense against totalitarianism and brute force in the

1. 11 *Ford L. Rev.* 255 (November 1942); in *Phases of American Culture* (1942) 51. See also, 49 *The Catholic World* 114 (May 1944).
2. 30 *Geo. L. J.* 493 (April 1942).
3. Palmer, "Hobbes, Holmes and Hitler", 31 *A.B.A.J.* 569, November, 1945; Palmer, "Defense Against Leviathan", 32 *A.B.A.J.* 328, June, 1946; Palmer, "Reply to Mr. Charles W. Briggs", 32 *A.B.A.J.* 635, October, 1946; Wilkin, "Natural Law: Its Robust Revival Defies the Positivists", 35 *A.B.A.J.* 192, March, 1949; Manion, "The Founding Fathers and the Natural Law", 35 *A.B.A.J.* 461, June, 1949; McKinnon, "The Higher Law", 33 *A.B.A.J.* 106, February, 1947; Dodge, "Thomas Aquinas: Advocate of Natural Law and Limited Sovereignty", 33 *A.B.A.J.* 1013, October, 1947; McKinnon, "The Secret of Mr. Justice Holmes", 36 *A.B.A.J.* 261, April, 1950.
4. *Boston American*, December 18, 1950, page 34.
5. 64 *Harv. L. Rev.* 529 (1951).

modern world will not succeed. It is too transparent. It reveals either an amazing ignorance of the elementary difference between philosophy and theology or a very quick forgetfulness of the articles by Fathers Ford and Lucey. For both those articles were philosophical and not theological. Furthermore this attempt to brush off natural law ignores the fact that down through the ages there have been and are today innumerable scholars of distinction who accept the natural law on philosophical or non-Catholic bases: the Stoics, Cicero, Grotius, Locke, Hooker, Vattel, Burlamaqui, James Wilson and Alexander Hamilton. And in our own day we have such staunch defenders or expositors of the natural law as Mortimer Adler, Robert N. Wilkin, Joseph C. Hucheson, Jr., Gordon Hall Gerould, Felix Morley, George Sokolsky and Edward S. Corwin.[6]

Professor Howe's Strategy Is Evident

The evident strategy of Professor Howe is to mention the broad criticisms of the philosophy of Holmes and then concentrate on a single narrow point and attempt to dispose of that as if it were all there is to the "positivism of Mr. Justice Holmes". The characterization of Holmes as a positivist by Lon Fuller[7] is referred to and then Professor Howe says: "Though Professor Fuller does not quote Holmes' most famous pronouncement on the virtue of the soldier's faith, he undoubtedly had in mind" Holmes' Memorial Day speech in 1895:[8]

> I do not know what is true. I do not know the meaning of the universe. But in the midst of doubt, in the collapse of creeds, there is one thing I do not doubt, that no man who lives in the same world with most of us can doubt, and that is that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has no notion, under tactics of which he does not see the use.

Then as if this quotation were the whole story Professor Howe triumphantly exclaims: "To read Holmes' Memorial Day Address as the creed of an authoritarian is totally to disregard its context."[9] Here is a straw man and one built up on a conjecture as to what Professor Fuller "undoubtedly had in mind". So it is that the advocate may attempt to narrow all his antagonist's case to a single statement which, standing alone, can be easily refuted. But those who have read Holmes' many statements which prove his totalitarianism will not be misled.

Nor will they be misled by Professor Howe's concentration on Holmes' "The Path of the Law" as "the alleged source of all imperfections" and his conclusion that that address "is anything but the formulation of a totalitarian creed".[10] This is as if the whole case against the philosophy of Holmes rested upon "The Path of the Law" and to disregard all the evidence to the contrary. So too one could pick out innocuous statements from *Mein Kampf* but such picking would hardly be convincing to one familiar with Hitler's writings and addresses.

A second bit of Professor Howe's strategy is not to meet head-on the arguments for natural law or the documented criticisms of Holmes' philosophy, but to dismiss them summarily in this fashion:[11]

> Those who are encouraging the revival of natural law, though they do not ask us to receive it with all its implications of divine authority, seem to me to be seeking shelter from skepticism beneath the delusive security of a phrase. The security is sure to be deceptive so long as the phrase embraces no concepts more serviceable than those of social convenience, utility and public need. If that is all that is included in this new law of nature which is being offered us as an alternative to the positivism of Holmes, it seems to me clear that we are only being asked to swap phrases in the middle of the philosophic stream.

Waiving the question whether the security of such a phrase as "the unalienable rights of man" is deceptive, we admit that Professor Howe precedes his own particular definition of natural law by an "if". He says, "If that is all that is included in this new law of nature." We think that we are not unfair, however, in suspecting that Professor Howe suspects that the average reader will overlook the "if", conclude that natural law is as defined by Professor Howe and dismiss all of it as lightly as does the professor. And furthermore the reader may also regard natural law as something new which a small group of men are attempting to foist upon a democratic people. It is Professor Howe and Holmes that the fathers of the Constitution would have regarded as innovators. It is the philosophy of Holmes that is new, or at least old philosophic error in a new dress.

BEN W. PALMER

Advocates of Natural Law Are Not "Seeking Shelter"

The purpose of the charge that advocates of natural law are "seeking shelter from skepticism beneath the deceptive security of a phrase" is to charge them with an insecurity of position which they do not feel and which has no existence. Moreover this is to treat the whole case for natural law as if it were merely the answer to an emotional need rather than based on philosophy and the

6. *Natural Law Institute Proceedings*, Notre Dame University, Volumes 1, 2, 3 and 4, 1950. 24 Notre Dame Lawyer 343 (1949); 25 *id.* 258 (1950).
7. *The Law in Quest of Itself*, 1940.
8. Howe, 64 Harv. L. Rev. 529, 532.
9. Howe, *loc. cit.* 537.
10. Howe, *loc. cit.* 540.
11. Howe, *loc. cit.* 545.

age-old thought and experience of the race. The basis of our constitutional liberties and the only present-day defense against totalitarianism is only "a delusive concept". And of course, Professor Howe who speaks of "our own skepticism"[12] has no time for absolutes. They are "shop-worn",[13] "shackles"[14]—as if the truth that two and two are four is a "shackle". And so he speaks of the "monarchy of absolutes",[15] as if the truth could not make men free and as if there were something evilly anti-democratic in the very truths that prevent democracy from becoming tyrannical and totalitarian. And so too one may ask whether Professor Howe's attitude towards religion is not revealed in his choice of the epithet "stubborn". If you like the other fellow's stand it is "courageous"; if you don't like it you call it "stubborn". So Professor Howe speaks of "Harvard's stubborn assurance that reason and morality, religion and piety had discovered the final answers to all the mysteries of the universe."[16]

And as to morality, this brings us to the third point in the strategy of Professor Howe. It is to argue that Holmes was not opposed to morality. "It is my thesis that . . . from first to last he [Holmes] insisted that the ultimate source of law is the moral judgment of the community."[17] "Holmes did not deny that a primary source of law is the realm of moral standards."[18] Here Professor Howe leaves the matter so that the reader who believes in religion or that moral standards have an objective basis in eternal truth and in the absolutes derided by the skeptics may assume such standards on the part of Holmes.

"Undoubtedly" Professor Howe would agree with Professor Fred Rodell who in an article[19] echoing the Harvard professor says that so large a part of the work of Holmes was "devoted to digging beneath the deceptive clap-trap of word-thinking". What about the "morality" which Professor Howe says meant so much to Holmes? Did it mean what it means to men of religion or to those who are philosophically convinced that there is such a thing as absolute, immutable truth? Professor Howe knows the words of Holmes: "As to Ethics I have called them a body of imperfect social generalizations expressed in terms of emotion."[20] "In fact even in the domain of morals I think it would be a gain, at least for the educated, to get rid of the word and notion Sin."[21] "It would be well if the intelligent classes could forget the word sin and think less of being good."[22] Was it not all a matter of taste, perhaps, like sugar in your coffee?[23] "I should think the only principles worth talking about were the existing notions of public policy."[24] "However I am so skeptical as to our knowledge about goodness or badness of laws that I have no practical criticism except what the crowd wants."[25]

So here it is. If moral principles are merely what the majority of the people want at a given time, then the laws they democratically make must be morally good. And so the positive law is the same as the moral law. And there are no objective standards by which to judge a law as "unjust" or "morally bad" or violative of any higher law. This of course is totalitarianism. And it is this very distinction between Holmes' brand of morality and morality as conceived of by the man of religion or the philosopher who believes in absolute objective truth that is ignored by both Professor Howe and Professor Rodell. Of course, if that distinction be unknown to the reader of their articles he may be led to believe that critics of Holmes are not only mistaken but enemies of democracy. The fact is that it is they who are the true friends of democracy. For they would restrain it from a trend towards totalitarianism that can end only in the destruction of democracy itself—or at least of constitutional liberty.

Here is the nub of the whole controversy. Many liberals admired Holmes because they did not know of or consider the totalitarian implications of his philosophy. They were not familiar with his nonjudicial writings. Furthermore they were filled with admiration of him because of his army service, his distinguished career, his gift of phrase. And above all they admired him because it happened that many of the laws he upheld against constitutional assaults on legislative power were of a humanitarian nature—laws which they passionately desired. So he became the god of their idolatry. They did not perceive that his philosophy led to legislative omnipotence. They overlooked the fact that a popularly controlled government based on free assembly, free speech and a broad franchise with a secret ballot and uncontrolled elections is no guaranty of respect for the rights of individuals or of minorities. Holmes' philosophy is no defense. But rather is there encouragement in his doctrine that the test of truth is its ability to get itself accepted in the market place,[26] or that truth is "the majority view of that nation which can lick all others".[27] If Stalin conquers, then in the philosophy of Mr. Justice Holmes, atheistic communism will become the truth.

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12. Howe, *loc. cit.* 546.
13. Howe, *loc. cit.* 546.
14. Howe, *loc. cit.* 546.
15. Howe, *loc. cit.* 545.
16. Howe, *loc. cit.* 534.
17. Howe, *loc. cit.* 541.
18. Howe, *loc. cit.* 544.
19. "Holmes and His Hecklers", 15 *The Progressive* (a magazine founded by Robert M. LaFollette, Sr.) 9 (1951). Professor Rodell's general attitude toward the law may be indicated by these words from his book *Woe Unto You Lawyers!* (1939): "The legal trade, in short, is nothing but a high-class racket" (page 15); lawyers are "those modern purveyors of streamlined voodoo" (page 20); "the mighty fraud of The Law" (page 196); later it is "the big balloon of inflated nonsense" (page 206); "that inflated mass of hokum", (page 220); "the whole pseudo-science of The Law, regardless of its results, is a fraud" (page 226); the law is "an uncertain and imprecise abracadabra devoted to the solemn manipulation of a lot of silly abstractions" (page 245).
20. 2 *Holmes-Pollock Letters* (1942) 3.
21. *Id.* at 200.
22. *Id.* at 178.
23. 1 *id.* at 105.
24. Shriver, *Holmes' Book Notices, Uncollected Letters and Papers* (1936) 188.
25. 1 *Holmes-Pollock Letters* 163.
26. Dissent in *Abrams* v. *United States*, 250 U.S. 616, 630, 40 S. Ct. 17, 22.
27. Holmes, *Collected Legal Papers*, page 310.

1951-1952 Officers and New Members of the Board of Governors

■ The House of Delegates of the American Bar Association, meeting during the 74th Annual Meeting in New York City, elected officers and four new members of the Board of Governors at its first session on September 17 in the Waldorf-Astoria Hotel.

Howard L. Barkdull, of Ohio, was named President, and Joseph D. Stecher, of Ohio, and Harold H. Bredell, of Indiana, were re-elected Secretary and Treasurer respectively. New members of the Board of Governors, elected for three-year terms, are as follows:

First Circuit—Allan H. W. Higgins, of Massachusetts;

Second Circuit—Cyril Coleman, of Connecticut;

Sixth Circuit—Donald A. Finkbeiner, of Ohio;

Tenth Circuit—Ross L. Malone, Jr., of New Mexico.

Members of the Board comprise the officers of the Association, the last retiring President, the Editor-in-Chief of the JOURNAL, and one representative from each of the ten judicial circuits.

A sketch of the new President, Mr. Barkdull, appeared in the October issue of the JOURNAL; Mr. Stecher, has been Secretary since December of 1945. (See 32 A.B.A.J. 34; January, 1946). Mr. Bredell was elected Treasurer at St. Louis in 1949. (See 35 A.B.A.J.; November, 1949).

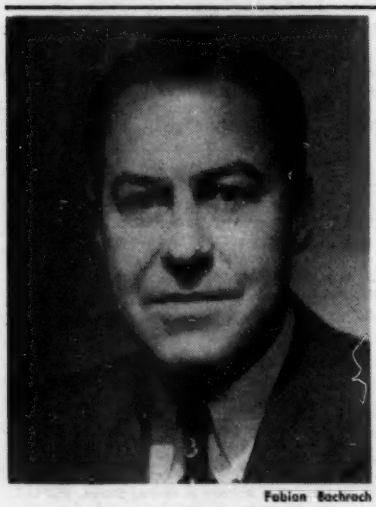
Allan H. W. Higgins, the new member of the Board for the First Circuit, lives in Boston. A graduate of Harvard College (A.B. '25) and Harvard Law School (LL.B. '28), he is in charge of the tax department of his firm in Boston. A member of the American Bar Association since 1940, he is Vice Chairman of the Section of Taxation and was chairman of the Tax Section's Committee on Equalization of Taxes in Community Property and Common Law States, which was instrumental in securing the split-income and marital deductions provisions of the Revenue Act of 1948.

He has been practicing in the field of taxation for twenty years and has delivered numerous lectures on that subject before legal and other professional groups throughout the United States.

He is a member of the Massachusetts Bar Association, the Boston Bar Association and the Essex County Bar Association. He is also a member of the General Advisory Committee re Drafting the Internal Revenue Code of the American Law Institute.

The new Board of Governors member for the Second Circuit, Cyril Coleman, was born in Meriden, Connecticut, September 1, 1902. After attending the local schools in Meriden, he received an A.B. degree from Harvard College in 1924, and an LL.B. degree from Harvard Law School in 1927. Upon his graduation from law school he became associated with a Hartford law firm, where he is now a partner, engaged for the most part in trial practice. He was married on June 4, 1931, to Katherine Alexander. They have four children.

He has been a member of the Police Commission of the City of Hartford, a member of the Metropolitan District Commission, and of the Hartford Park Board, and a director of the Hartford Public Library. He has served as a member of the Judicial Council of the State of Connecticut and was State Delegate from Connecticut to the House of Delegates of the American Bar Association.



Fabian Bachrach

ALLAN H. W. HIGGINS

CYRIL COLEMAN

He was a member of the Commission which drafted the new Charter for the City of Hartford, and was elected the first Mayor under the new Charter on November 4, 1947. He was re-elected on November 8, 1949.

Donald A. Finkbeiner, new Board member for the Sixth Circuit, was born at Perrysburg, Ohio, in 1894. He attended public schools in Perrysburg and Toledo and completed his education at the University of Michigan and its law school.

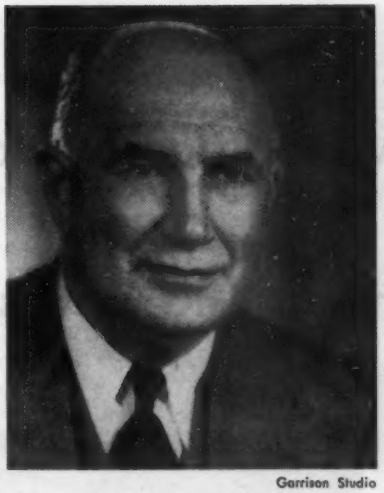
Admitted to the Ohio Bar in 1921, he has been practicing in Toledo since then. Mr. Finkbeiner describes his practice as "corporate and general".

He was President of the Ohio State Bar Association in 1940-1941, and also served as Chairman of its Membership and Budget Committees. In the Toledo Bar Association, he has served as a member of the Executive Committee and as Chairman of the Program and Budget Committees.

He is Vice President and Member of the Board of Trustees of the Toledo Chamber of Commerce, Vice President and member of the Board of Trustees of the Toledo Zoological Society and is Vice Chairman of the Toledo Civic Opera Association, as well as President of the Toledo Safety Council and of the University Club of Toledo.

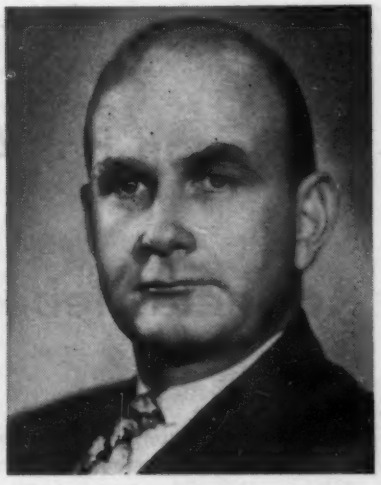
Mr. Finkbeiner served in the Army from 1917 to 1919 in the 83d and 10th Divisions.

He is married and has a son and a daughter.



Garrison Studio

DONALD A. FINKBEINER



ROSS L. MALONE, JR.

Ross L. Malone, Jr., the new member of the Board for the Tenth Circuit, was born in Roswell, New Mexico, in 1910. He is one of the youngest men ever to be elected to the Board.

He was admitted to the Bar of New Mexico in 1932 after receiving his LL.B. degree at Washington and Lee University in Virginia.

He has practiced in Roswell since his admission, except for active duty from 1942 to 1946 as a member of the Naval Reserve. He was released from active duty as lieutenant commander after seeing service in the Continental United States and for fifteen months in the Pacific aboard the U.S.S. *Cape Esperance*, an escort carrier.

He is a member of the Board of Bar Examiners of the State of New Mexico and is Chairman of the Committee on Continuing Legal Education of the State Bar of New Mexico. He was a member of the Legal Committee of the Interstate Oil Compact Commission from 1946 to 1951.

He is the author of "Legal History of the Conservation of Oil and Gas in New Mexico" and "Oil and Gas Leases on U.S. Government Lands", as well as other articles in the field of oil and gas law.

A member of the Association since 1937, he has been State Delegate from New Mexico since 1946 and is a former member of the Association's Committees on Bill of Rights and American Citizenship.

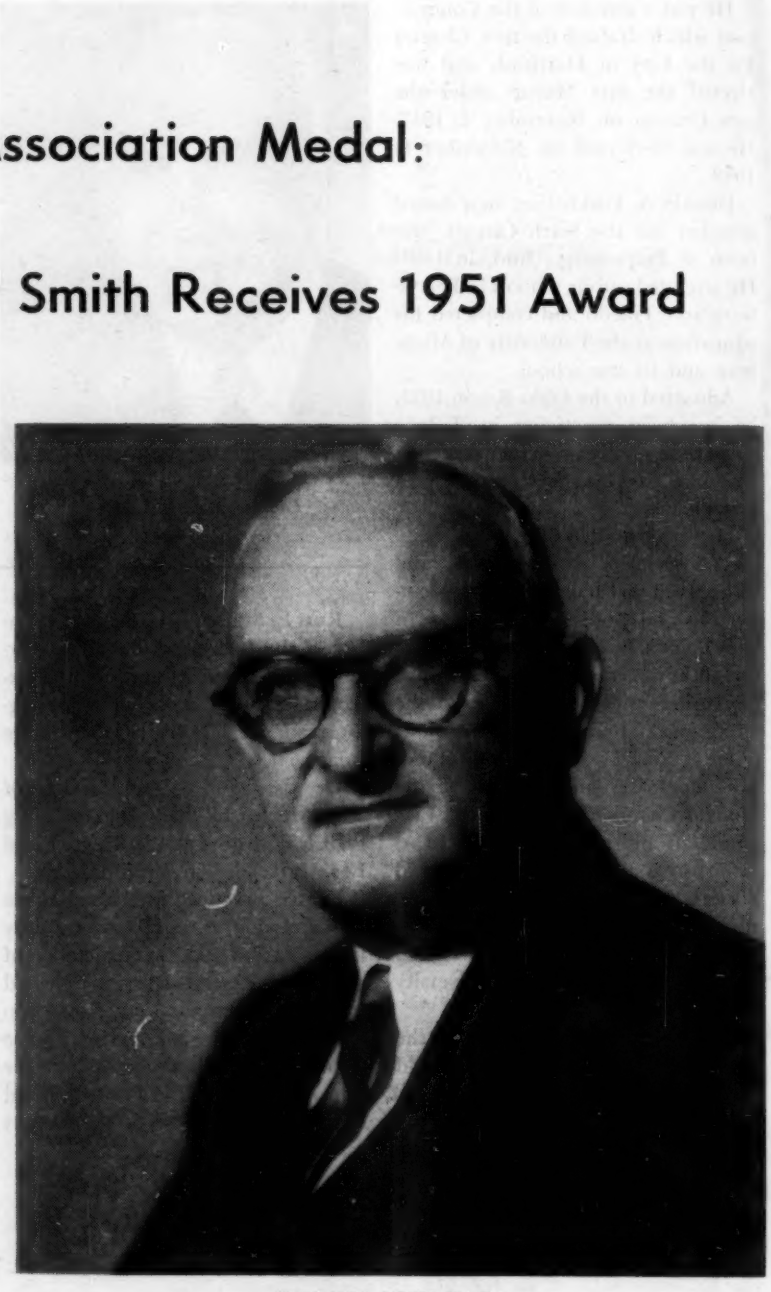
American Bar Association Medal:

Reginald Heber Smith Receives 1951 Award

■ The highest honor the American Bar Association can bestow upon one of its members, the American Bar Association Medal, was presented at the 1951 Annual Dinner, September 20, to Reginald Heber Smith, of Boston. Mr. Smith, the seventeenth man to receive the Medal, has made many notable contributions to the public, the profession and the Association. He was one of the early leaders in the legal aid movement in the United States, and is the author of *Justice and the Poor*. He wrote the widely acclaimed aid to efficient law office management, *Law Office Organization*. He has been a member of the Board of Editors of the JOURNAL since 1941, and is the Director of the Survey of the Legal Profession.

The citation voted by the Board of Governors reads:

"Reginald Heber Smith, while other youthful legal aspirants were refusing to put away childish things, you were coming to grips with the actuality of practice. While they were devoting their time to cultivation of themselves, you were devoting your young strength to the assistance of those unable to pay for legal service. The demands of your active early years of practice did not prevent your preparation of a book that founded the modern system of legal aid. All over our land people are receiving more efficient attention from lawyers because of what you have taught us about the business-like management of our offices. For years your talents have been an influence for good in our Association's publication. Your generous nature and self-effacing love of your profession and of your fellows at the Bar have made you, wherever lawyers are gathered together, the center of an affectionate group who seek the joy of your gay companionship and the help of your wise counsel.



REGINALD HEBER SMITH

"Now you near the end of your great but unrecompensed task as Director of the Survey of the Legal Profession. Thanks to you, the Bar now for the first time is beginning to know its own resources and will be able to marshal them effectively in the fulfillment of its high duty of administering justice according to law. In gratitude to you, therefore, for your conspicuous services in the

cause of American jurisprudence, the Board of Governors takes great pleasure in awarding to you the American Bar Association Medal."

In presenting the Medal, President Fowler said in part:

"Each year at this time the Association bestows upon some lawyer who has by distinctive and outstanding service earned it, the Gold Medal of the American Bar Association.

"I could not imagine a situation that would give me more pleasure than having the opportunity to present this Medal tonight to the recipient, who is a personal friend and who has been of great help in guiding and advising me through the years I have worked in this Association.

"As a very young man, faced with the usual problems of the young lawyer, while just making a living and trying to learn a little more about our profession, he still had time to realize that all Americans, regardless of their financial and economic situation, were entitled to representation before our courts; he was early one of the leaders in the legal aid movement in the United States, and ever since that time has been an outstanding leader in this service which lawyers should furnish to the people of our country.

"He has never grown weary of unselfishly serving his profession. When the Survey of the Legal Profession needed a director, although it had provided a rather handsome salary, he assumed the position and refused to accept any compensation, except the satisfaction of service.

"I am sure that there never was a man who more richly deserved this Medal."

Mr. Smith responded as follows:

"Mr. President, honored guests, ladies and gentlemen:

"The simple truth is that I am delighted to receive this Medal, which I consider the highest civilian award that can come to any American lawyer. My happiness is natural inasmuch as I have always loved the profession, and the unusual opportunities it affords us to serve our people and our world.

"My own great opportunity lies just around the corner, for next month I begin to write my final report as Director of the Survey of the Legal Profession. After thirty-seven years of active practice and four years of intensive study, I have some ideas as to what needs to be said, and I pray that the right words may be given to me.

"For your kindness to me tonight, I thank you all sincerely and humbly."

The sixteen outstanding lawyers previously awarded the American Bar Association Medal are:

1929—Samuel Williston
1930—Elihu Root
1931—Oliver Wendell Holmes, Jr.
1932—John Henry Wigmore
1934—George W. Wickersham
1938—Herbert Harley
1939—Edgar Bronson Tolman
1940—Roscoe Pound
1941—George Wharton Pepper
1942—Charles Evans Hughes
1943—John J. Parker
1944—Hatton W. Sumners
1946—Carl McFarland
1947—William L. Ransom
1948—Arthur T. Vanderbilt
1950—Orie L. Phillips

The addition of the name of Reginald Heber Smith to the above distinguished roster is a suitable and well merited recognition of his unselfish and outstanding services to the American public, the profession and the Association.

Union Internationale des Avocats Meets in Rio de Janeiro

▪ The Thirteenth Congress of the Union Internationale des Avocats was held in Rio de Janeiro from September 7 to September 12, 1951. This was the first occasion of the Union's meeting outside Europe since its organization.

The Congress was inaugurated in a formal session on September 7 with the Minister of Justice of Brazil, Dr. Francisco Negrão De Lima, presiding. The final session on September 12 was also formal with the Foreign Minister, Dr. João Neves da Fontoura, presiding.

There were three plenary business sessions and four section meetings.

Speeches on the topic, "The Function of the Lawyer in Contemporary Society", were made by Jean Thevenet, of Belgium, and Juan A. de Zulueta, of Spain. Robert Planty, of France, advocated that lawyers, especially in criminal proceedings, be permitted to appear before the courts of any country, which he called "The Internationalization of the Right of Defense". In this connection, Levy Carneiro raised the question of the establishment of an international court for the protection of human rights.

Simarro Puig and Juan A. de Zulueta, of Spain, Oscar da Cunha, of Brazil, and Azevedo Perdigão, of Portugal, submitted papers on the topic, "Legal Aid, Costs and Rapidity of Justice". Sir Godfrey Russell Vick, of England, described the system that had been devised there which reduces costs and lawyer's fees for poor litigants, without sacrificing the independence of the Bar.

Papers were submitted on the topic, "The Organization of the Bar" by Eduardo Couture, of Uruguay, and Armando Vidal, of Brazil.

Papers were submitted by Haroldo Valladão, of Brazil, on the possibility of international adjudication of civil causes and by George H. Owen, of the United States, on present methods of international co-operation in civil proceedings.

Papers on the subject, "International Action for the Repression of Common Crimes", were submitted by Laertes Munhoz and Madureira de Pinho, both of Brazil. Nicholas Doman, of the United States, spoke on this subject, referring to the Nuremberg trials as a milestone in

(Continued on page 838)

Danger to America:

The Draft Covenant on Human Rights

by William Fleming • Chairman of the Department of Political Science at Ripon College (Wisconsin)

■ This is the second half of Mr. Fleming's analysis of the proposed Covenant on Human Rights prepared by the United Nations' Human Rights Commission at its April-May, 1951, session. In the first half of his article, which appeared in last month's issue of the *Journal* (37 *A.B.A.J.* 739), Mr. Fleming examined the economic, social and cultural "rights" embodied in the Covenant. This month, he concludes the analysis with a study of the civil and political rights provisions of the document.

Second Installment

■ The emphasis put so far on economic, social and cultural rights is not to be taken to suggest that the Draft Covenant on Human Rights shows signs of perfection in its civil and political provisions. Far from it.

(1.) Here, too, especially in Part II of the document, the Soviets scored, this time in a more subtle manner which, it is true, does not become apparent immediately, but which, nevertheless, is a fact that cannot well be disputed. It will be remembered that the Covenant was supposed to give legal effect to the Universal Declaration of Human Rights which had but moral significance. It is against this background that the question should be asked: For what reason have many important articles of the Declaration been deleted from the Draft Covenant altogether? For example, the provisions of the Declaration that:

(a) All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood (Article 1).

(b) Everyone has the right to life, liberty and the security of the person (Article 3).

(c) No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks (Article 12).

(d) Everyone has the right to seek and to enjoy in other countries asylum from persecution (Article 14).

(e) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. Everyone has the right of equal access to public service in his country (Article 21).

(f) Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property (Article 17).

All these provisions owe their existence to the philosophy of liberal democracy. Now, when they were thought to be important enough to be incorporated in the Universal Declaration of Human Rights, why, then, were they all of a sudden omitted from the Draft Covenant? The answer is simply suggested by the well known distaste of the Soviets for the ideas on which these rights rest and their refusal to adhere to them in the actual operation of their government. Therefore, it is not just a coincidence that the framers of the Draft Covenant "forgot" to give these rights legal recognition in the document.

(2.) The Covenant contains the general principle[76] that a ratifying state undertakes "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in this Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national[77] or social origin, property, birth or other status". It is difficult to avoid the conclusion that this provision would void some important federal legislation. "The Federal Government has not pursued a policy of equal treatment of aliens and citizens. Citizens have rights superior to those of aliens in the ownership of land and in exploiting

76. Draft Covenant on Human Rights, Art. 1, §1.

77. In contradistinction to the Draft Covenant the European Bill of Rights has a more realistic approach to the problem of aliens. Freedom of expression, assembly, etc. shall not "be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens". Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 16; *Am. Jour. Intl. Law* (April, 1951), Off. Doc. page 29.

natural resources."[78] And what about the Smith Act of 1940 and the Internal Security Act of 1950? Would they not, too, be adversely affected by this provision of the Covenant? The Committee for Peace and Law Through United Nations of the American Bar Association had, and quite rightly so, similar apprehensions[79]. As far as the American people are concerned, it is more than doubtful that they would be in favor of such an extreme egalitarianism as proposed by the Covenant in its present form. In all probability, they would, if adequately informed, reject this "most favored individuals clause" according to which, in the paraphrased words of Cordell Hull, every ratifying state obligates itself not to treat anybody worse than the person it treats best of all.

Furthermore, the provision is incompatible with the system of federalism. Just a short time ago, the State of Connecticut adopted a law barring women from standing at bars even if they are not drinking[80]. The law runs afoul of the Covenant but not of the Federal Constitution since the Supreme Court would not declare that the equal protection clause[81] had been violated. Three years ago the State of Washington passed a law making it unlawful to sell liquor to women except when seated at tables—a discrimination that would undoubtedly be destroyed by the Covenant on Human Rights. But why should Washington, Connecticut or any other state in the Union, for that matter, be compelled to forego its right to deal with its own social problems in accordance with its own judgment, subject only to the Federal Constitution?

The Covenant has an even more far-reaching significance. It outlaws not only governmental action contravening the rights enumerated in the Covenant, but it aims ultimately at United Nations' protection of these rights against *private*[82] action allegedly infringing upon them. This objective of the Covenant becomes manifest from the provision referred to above that states undertake to *ensure* to all individuals the rights of the Covenant without any distinction. The same objective is definitely established in the subsequent provision[83] that everyone shall have an effective remedy, notwithstanding that the violation of rights has been committed by persons acting in an official capacity. The reference to officials makes sense only under the assumption that violations by private persons are included as well. However, since President Johnson's vetoes of the Freedmen's Bureau Bill and the Civil Rights Bill and since the Supreme Court decisions in the *Slaughter House Cases*[84] and *Civil Rights Cases*[85] it has been an established principle of American constitutional law that an individual invasion of individual rights is simply a private wrong for which the individual may seek redress by resort to the laws of the state. Again, no reason can be adduced why this principle ought to be abandoned.

(3.) "The basic civil and political rights set forth in the Draft Covenant are well known in American tradition and law[86]." Nothing could be farther from the truth. This will be seen from (A) the discussion of some of the individual political rights and (B) from general principles made applicable to them.

Lack of space prevents a thorough analysis of all the political rights enumerated in the Draft Covenant. Only some of the most important ones can be singled out for discussion.

The Draft Covenant, recognizing the value of fair procedure in criminal cases, deals with the subject in a rather comprehensive manner[87]. Still, from the American point of view the provision must be held unsatisfactory. For Americans "an independent and impartial tribunal" as prescribed by the Covenant is still a far cry from trial by jury. Was it really too much to expect the American delegation to insist upon this venerable institution being in some way given recognition in the Covenant? Americans will also look in vain for a prohibition stipulating that no one shall be subject to be put twice in jeopardy of life or limb for the same offense. They will look in vain for a prohibition against the requirement of excessive bail[88]. They will look in vain for a prohibition against compelling a man to be a witness against himself[89]. They will look in vain for rules of evi-

78. Mr. Justice Reed dissenting in *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410 (1948). "The United States limits the rights of aliens as compared with citizens in land ownership in its territories, 8 U.S.C. Paragraphs 71-86; in disposition of mineral lands, 30 U.S.C. Paragraph 181; of public lands, 43 U.S.C. Paragraph 161; in engaging in coast-wise trade, 46 U.S.C. Paragraphs 11, 13; in operating aircraft, 49 U.S.C. Paragraphs 176 (c), 521." Dowling, *Cases on Constitutional Law* (4th ed. 1950), page 1177, note 3.

79. The first section of Art. 1, the Committee declares, "is drawn in such broad language that it may be deemed, for example, to confer on aliens rights appertaining to citizenship, without requiring correlative duties, or to prohibit laws requiring property or citizenship qualifications for various purposes . . ." (Report September 1, 1950, page 80.)

80. *The New York Times*, July 12, 1951; to the same effect see Laws of the State of Washington, 1949, Chapter 5, page 13.

81. Fourteenth Amendment.

82. This is conceded by Professor Chafee, *op. cit.*, page 406.

83. Draft Covenant on Human Rights, Art. 1, § 3.

84. 16 Wall. 36 (1873).

85. 109 U.S. 3 (1883).

86. James Simsarian, *op. cit.*, page 1003.

87. Draft Covenant, Art. 10.

88. It is true that Article 6, Subsection 4, contains a bail provision insofar as pending trial detention shall not be the general rule, but release may be subject to guarantees to appear for trial. However, the fixing of excessive bail is not expressly prohibited. See also Report of the Committee for Peace and Law Through United Nations, September 1, 1950, pages 81-82.

89. At least this is the case, if one takes the official State Department edition of the Covenant as a guide. According to this version, no such right is included in Art. 10. However, Art. 10, as prepared in the March-May, 1950 Draft of the Human Rights Commission (see September 1, 1950, Report of the Committee on Peace and Law, page 72), contains the following: "(e) No one shall be compelled to testify against himself or to confess guilt." This language is omitted in the June 25, 1951, Department of State Bulletin, page 1009, where Section 10 (2) has only five subsections, ending with "(e)", whereas, in the 1950 Draft, Article 10 (2) had six subsections, ending with "(f)". The State Department's own mimeographed edition, which came out before the Department of State Bulletin, also contains the omission. On the other hand, in examining the Report of the Seventh Session of the Commission on Human Rights, page 57, also page 18, one finds that it is said that Parts I and II (Articles 1-18) are the same as the text prepared at the Sixth Session; and the draft of Art. 10 contained in the mimeographed Report of the Seventh Session, page 64, does contain the language to the effect above quoted that "no one shall be compelled to testify against himself or to confess guilt". So one does not know exactly what the facts are.

dence designed to curb the otherwise arbitrary power of a court to admit evidence at its discretion. Are the absences of these rights and guarantees "well known in American[90] tradition and law"?

A discussion of criminal procedure under the Draft Covenant would remain incomplete without reference to one of the most amazing provisions of the document. Article 3, Section 3, provides:

> In countries where capital punishment exists, sentence of death may be imposed only as a penalty for the most serious crimes, pursuant to the sentence of a competent court and in accordance with law not contrary to the Universal Declaration of Human Rights.

Unenviable, indeed, would become the position of a trial judge should the Draft Covenant be adopted! This judge, "in sentencing an accused found guilty by a jury of murder, would have to study not merely the constitutions and laws of his country, but the Universal Declaration of Human Rights. He would have to determine whether under such Declaration he is entitled to sentence the defendant to death or whether he should ignore the law of his own country, if, in his opinion, the Declaration of Human Rights conflicts with the domestic law in any particular."[91]

Freedom of expression is provided for, to be sure, in the Draft Covenant[92]. However, it is subject "to such restrictions as are provided by law and are necessary for the protection of national security, public order, safety, health, or morals or the rights, freedoms, or reputations of others."[93] It is further subject to derogation in case of a "state of emergency officially proclaimed by the authorities."[94] How can this provision be reconciled with the First Amendment which reads: "Congress shall make no law . . . abridging the freedom of speech or of the press." This limitation on Congress also applies to states and municipalities by virtue of the Fourteenth Amendment[95]. It may conceivably be argued that there is no difference between the Draft Covenant and the First Amendment because, although the constitutional injunction against any limitations on freedom of expression does not seem to allow of exceptions at all, actually these exceptions are made under the Constitution in both judicial pronouncements and legislative enactments. As to the former, it may be pointed out that court decisions frequently interpret freedom of expression as being relative rather than absolute. As to the latter, reference may be made to laws which are enacted from time to time with a view to limiting freedom of speech or expression as illustrated, for instance, by the Espionage Act of 1917. These arguments are not convincing. They overlook the following factors:

The relativity of freedom of speech is recognized in American constitutional law to the effect that, for example, "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[96] On the other hand, freedom of speech has been declared by the Court as belonging "to the great indispensable democratic freedoms, secured by the First Amendment. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions."[97] Consequently, the usual presumption in favor of the constitutionality of a contested law does not apply in the case of a statute which appears to violate freedom of expression. If there are doubts as to the validity of such a statute, the presumption is against its constitutionality. All laws in the United States attempting to curtail freedom of expression must stand the test of final judicial review under the First Amendment by a court independent of the executive and legislative power. It is not open to doubt, then, that in this country freedom of expression possesses a highly valued and privileged position which has not been accorded to the corresponding freedom of expression in the Draft Covenant. In many other countries independent courts to protect individual freedoms do not exist. "Law" in those countries is executive decree, or legislative fiat, wholly immune from challenge by anyone.

The inferior status given to this freedom in the Covenant can be seen, above all, from the great variety of matters with regard to which restrictions are permissible. It becomes also apparent from the nature of the other interests, considerations or rights which, according to the Draft Covenant, shall prevail should they clash with freedom of expression.

Free Speech Can Be Curtailed If Public Order Requires It

As we have seen, the Draft Covenant permits the enactment of laws for the purpose of restricting freedom of expression if this is necessary for maintaining *public order*. In this connection, *Terminiello* v. *City of Chicago*[98] comes to mind. Here the Court invalidated a city ordinance under which Terminiello, a rabble rouser, had been convicted. According to the United States Supreme Court the Chicago ordinance "permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of these grounds may not stand."

Furthermore, "rights of others", generally speaking, warrant, according to the Draft Covenant, legislative restrictions of freedom of expression. Not a word is said about the nature of these rights. In any event, to the Draft Covenant they are more important than the liberty which they are permitted to restrict.[99]

Can it be doubted that freedom of expression is more secure with the American Bill of Rights than

90. European states will miss what they consider indispensable safeguards in criminal procedure; among them the prohibition against a *reformatio in pejus* which otherwise might be brought about to the disadvantage of the defendant by a court of appeals or revision.

91. Report of the Committee for Peace and Law Through United Nations of the American Bar Association, September 1, 1950, page 81.

92. Draft Covenant on Human Rights, Art. 14.

93. *Ibid.*, § 3.

94. *Ibid.*, Art. 2, § § 1 and 2.

95. *Gitlow* v. *New York*, 268 U.S. 652 (1925); *De Jonge* v. *Oregon*, 299 U.S. 353 (1937); *Terminiello* v. *Chicago*, 337 U.S. 1 (1949).

96. *Schenck* v. *United States*, 249 U.S. 47 (1919).

97. *Thomas* v. *Collins*, 323 U.S. 516 (1944).

98. 337 U.S. 1 (1949).

with the Draft Covenant? Under the latter, the destruction of *La Prensa* would be perfectly legal since the order closing the plant of the courageous Argentine newspaper was based on grounds of national security.[100] In the United States "the Government could, for example, close down newspapers just as in other emergencies the President has closed down banks".[101]

Reference to the Espionage Act of 1917 does not succeed in conveying the impression that all the Draft Covenant does is to state the law of the United States. "Holmes made it quite clear that the Espionage Act did not supersede the First Amendment."[102] Had it not been for the "clear and present danger" in time of war which Mr. Justice Holmes, speaking for the Court, found to exist at that time, the Court would have declared the Espionage Act unconstitutional.[103] Under the Draft Covenant on the other hand, a law enacted for the protection of national security in either peace or war cannot be challenged on the ground that it infringes upon freedom of expression.

It is clear, then, that the proposed Covenant on Human Rights represents what the counsel for the American Newspaper Publishers Association, Elisha Hanson,[104] has called "the ultimate in hostile action against the right of the American people to enjoy free speech and to have a free press". Senator Bricker's recent apprehensions are entirely justified.[105]

Professor Chafee[106] is indignant at writers who prefer to stress the American point of view:

> Were the representatives of freedom-loving nations who wrote the whole of Article 14 so utterly base as to want to throttle freedom of the press while pretending to give it new strength? Or were they so stupid as to work into the evening for weeks and weeks doing just the opposite of what they intended? Yet they must have been either consummate knaves or hopeless idiots if there be a grain of truth in the words of the Hostile Critics: "That the sections impair the principles of the First Amendment seems evident."

This passage contains strong language, to be sure, but its *ad hominem* reasoning is rather weak. As far as the present writer is concerned, Professor Chafee may rest assured that the representatives of the freedom-loving nations are neither base nor stupid nor consummate knaves nor hopeless idiots, but, acting as diplomats, they sought, by way of compromise, to find a form of language that would be agreed to by countries having completely contrary philosophies as to freedom of expression. As is sometimes the case in compromises, principle died.

On freedom of religion the Draft Covenant (Article 13) provides:[107]

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are pursuant to law and are reasonable and necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Of this Article it has been appropriately said:[108]

> At a time when the expression and the teaching of a belief in a God is restricted to the smallest land area of the world in the past one hundred years, we are confronted with a concept of the freedom of religion embracing the free use of limitations reasonable and necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others. The purported agreement of church and state in Hungary is an example of religion under state regulation and control for public safety and order.
>
> The people of the United States are asked to approve those restrictions for others on the assurance that perhaps they will not apply in the United States. The persecuted brethren of any religious group in any country dominated by the Soviet shall be assured that such persecutions are legal and proper under a Covenant on Human Rights because the public safety and order of their state demand such protective action. Is this the message we shall send to persecuted worshippers in other lands?
>
> Today, when an atheistic ideology of great power and proportions confronts the religious groups of the world, an organ of the United Nations presents the doctrine of state regulation of religion, a codification of the right of regulation, and complete destruction of the freedom of religion if laws based on alleged public safety and order of the State shall so provide. The United Nations is presently at war with one branch of

99. "Minorities are the greatest sufferers from the deprivations of freedom of speech and freedom of the press. If ordinances, laws and decrees may be enacted for the protection of national security, public order, safety, health or morals, or of the rights, freedoms or reputations of others, minorities everywhere will be in a tragic state. As a matter of fact, wherever those provisions are part of the law they are in a tragic state. As a young man from an unnamed Latin American country said recently: 'In my country I keep my mouth shut.' " American Bar Association, Report of the Committee for Peace and Law Through United Nations, September, 1950, page 38.

100. Elisha Hanson, "Freedom of the Press: Is It Threatened in the United Nations?", 37 *A.B.A.J.* 417, June, 1951.

101. American Bar Association, Report of the Committee for Peace and Law Through United Nations, September 1, 1950, page 81.

102. Alfred H. Kelly and Winfred A. Harbison, *The American Constitution* (New York: W. W. Norton & Co., 1948), page 666. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has the right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right." In *Abrams* v. *U.S.*, Holmes and Brandeis dissenting said: "The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times. But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. . . . We should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. . . . Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law . . . abridging the freedom of speech.' " (Italics supplied).

103. In the *Schenck* case. See notes 96 and 102.

104. *Op. cit.*, page 478.

105. For the interesting position of *The New York Times* on Senator Bricker, see the editorial in the July 20, 1951 issue.

106. *Op. cit.*, page 459.

107. Art. 13.

108. Committee on Peace and Law, Report, September 1, 1950, page 43.

that ideology for the preservation of the freedoms of the world. In China a critical state is approaching for all representatives of religion in that great area.

How did these provisions find a place in a Covenant on Human Rights?

Political rights in Part II of the Draft Covenant are, generally speaking, not surrounded with the safeguards which are enjoyed by them in the American Bill of Rights.

Whereas in the United States rights are conclusively stated by the Constitution and constitutional amendments as the sole source of interpretation, and all ordinary laws must conform thereto, the Draft Covenant often[109] conditions the existence of rights by making them subject to restriction by ordinary laws. Thus, any "guarantee" by the Draft Covenant is nonexistent. This is the European tradition, to be sure, but certainly *not* the American.

Furthermore, as is well known, in the United States, with only the exception of the writ of habeas corpus, the rights and liberties cannot be suspended under any circumstances, not even in times of war. Emergency does not create power.[110] On the other hand, the Draft Covenant, again disregarding the American and following the Continental tradition, provides that, with certain exceptions, "in the event of an emergency officially proclaimed by the authorities of a state or in the event of a public disaster, a state may derogate" from certain of the rights provided in the Covenant.[111] This authorized derogation from supposedly "fundamental" rights prostitutes them to the "readily invented emergency declarations" of the omnipotent state.[112] Realizing that the broad term "emergency" may cover practically everything, the recently signed European Bill of Rights shows in this matter of suspension much more respect for human rights than the Covenant does. Under this document[113] European governments may not take measures derogating from human rights enumerated in the Convention except in time of war or other public emergency *threatening the life of the nation.* To believe, as the Covenant does, that every emergency, regardless of its intensity or nature, should justify a dictatorship, is an idea hardly compatible with democracy. The history of our time is characterized by a succession of emergencies. But democratic government must continue.

So must the fundamental freedoms lest the government be prevented from drawing upon an enlightened public opinion. The latter is in an emergency even more needed than in so-called normal times. "A fully informed public is the ultimate answer to all attempts to diminish the rights protected by the Constitution."[114]

According to Anglo-Saxon ideas, individual rights, to be worth the paper they are written upon, must ultimately enjoy the protection of independent domestic courts. The Covenant subscribes to a different philosophy. Any person whose rights or freedoms, as recognized by the Covenant, are violated shall have an effective remedy.[115] Any person claiming such a remedy shall have his rights thereto determined by competent authorities, political, administrative or judicial.[116] No better criticism of this provision has ever been offered than the following comment made by the British delegation.[117]

> The United Kingdom considers that an effective remedy must be a legal remedy, and that a claim that a human right has been violated must be determined by a court of law or by a tribunal whose decision has the force of law. Paragraph 3 (b) would permit of this question being determined by political or administrative authorities which have no judicial character. While it is right that political or administrative authorities should take action if a violation of a human right has occurred, and should, for example, make ex gratia payments by way of compensation in proper cases, such action is no substitute for a right on the part of the individual to have his claim that one of his rights as defined by the Covenant has been violated determined by an independent judicial tribunal. And the United Kingdom cannot accept subparagraph (b) paragraph 3.

Draft Covenant Is Different from Bill of Rights

The foregoing fundamental differences between the American Bill of Rights and the Draft Covenant concerning the treatment of individual rights in general are but the consequence of the deep and insurmountable cleavage that separates the philosophies on which the documents are, respectively, based. The American Bill of Rights, following John Locke, adhered to the idea of natural rights which appertain to man even before his decision to leave the state of nature for the purpose of establishing the political organization known as the state. The most important rights of the Bill of Rights are considered "natural", for instance, freedom of religion, of expression, of the press, the right to personal liberty and individual property.[118] They are *not created* by the American Constitution but are "retained by the people" (Amendment IX) and their retention by the people *confirmed* in the Constitution! Consequently, they cannot, by laws or any other way be modified, qualified, or taken back by the state because they are not given by the state, but are inherent natural rights. Furthermore, there

(Continued on page 855)

109. Draft Covenant on Human Rights, Art. 13, 14, 15, 16.

110. See notes 96, 102.

111. *Ibid.* Art. 2.

112. Committee on Peace and Law, Report, September 1, 1950, page 44.

113. Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 15. *Am. Jour. Intl. Law*, April, 1951, Off. Doc. page 28.

114. "Treaty Law Editorials—The Pulitzer Prize", editorial in the July issue of the *American Bar Association Journal* commenting on the receipt of the Pulitzer Prize by William H. Fitzpatrick, Editor of the *New Orleans States*, for his critical articles on treaty law and the Covenant on Human Rights (37 *A.B.A.J.* 519).

115. Draft Covenant on Human Rights, Art. 1, § 3, Cl. a.

116. *Ibid.* Cl. b.

117. Report of the Seventh Session of the Commission on Human Rights, United Nations Economic and Social Council, General E/1992 E/CN. 4/640, May 24, 1951 pages 101-102. See Committee on Peace and Law, Report, September 1, 1951, pages 19-20.

118. *Downes* v. *Bidwell*, 182 U. S. 244 (1901). "We suggest, without intending to decide, that there may be a distinction between certain natural rights" (the Court lists later on as natural rights those mentioned in the text) . . ."and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence."

Dean Pound and Bar Association Beginnings:

New Data Given Survey by *Journal* Readers

by Charles O. Porter • of the Oregon Bar (Eugene)

■ In the April, 1951, issue of the *Journal*, we published an article by Mr. Porter entitled "Dean Pound and Bar Association Beginnings: A Survey Request for Primary Data" (37 *A.B.A.J.* 269). The Survey of the Legal Profession immediately began to receive letters from *Journal* readers, many of which gave valuable clues about the origins of bar associations. The information received seems definitely to establish the Philadelphia Bar Association as the oldest in the United States. The Survey hopes that this second article will elicit more information from our readers.

■ "I was interested in the article 'Dean Pound and Bar Association Beginnings' by Charles Porter in the April, 1951, AMERICAN BAR ASSOCIATION JOURNAL", wrote Miss Virginia A. Knox, law librarian of the Connecticut State Library, on April 30, 1951, in a letter to the Survey of the Legal Profession.

That letter led us to a primary source that had escaped notice by every scholar in the field for the past fifty years. It was a speech by Walter B. Hill, President of the Georgia Bar Association, delivered on August 8, 1888, with the formidable title: "President's Address. Bar Associations. A Composite Photograph of the Objects and Work of the Various Bar Associations in the United States, with an Index of Their Publications."

This report is a gold mine. Mr. Hill was a one-man Survey of the Legal Profession. He wrote letters to all the bar associations listed in the Tenth Annual Report of the American Bar Association: twenty-five state associations, four territorial associations, two in the District of Columbia, and ninety-three county and city associations, 124 altogether.

He received sixty-eight replies, a little better than a 50 per cent return. (The Survey sent out a similar questionnaire to 1200 bar associations—and received a 12 per cent response.) Most of the local and county associations, he discovered, were "chiefly for maintaining libraries" and "quite a number" of the total were, as he put it, "*civiliter mortuus*".

Mr. Hill's Data Found To Be Internally Inconsistent

His questions dealt with the organization date of the association, its meetings, its publications and work. His presentation is stately and logical, most impressive. But, alas, his data are internally inconsistent on one vital point, which leaves the poor student of bar association origins feeling betrayed and disconsolate.

Mr. Hill writes "... the Law Association of Philadelphia easily outranks all the rest in antiquity. It was organized in 1814." He refers you to Appendix "A" where there is a list showing the date of organization of each association. You turn to Appendix "A" and find that *1802* not 1814, is the date given for the Law Association of Philadelphia.

This is no misprint. In 1902 the Philadelphia association celebrated its centennial and in 1952 they are planning to celebrate a sesquicentennial. However, and this is important, only a law library was founded in 1802, not a bar association.

A law library is not a bar association, though a bar association may operate a law library. A bar association formulates and enforces professional standards.

Arthur D. Littleton, the Chancellor of the Philadelphia Bar Association, was helpful in getting to the bottom of this "Philadelphia story". He would not, however, agree to a postponement of next year's celebration! Instead he sent us a copy of a book published in 1906 by his Association to commemorate the hundredth anniversary in 1902.

"These books are scarce", Mr. Littleton wrote, "and it is only by luck that I have come upon this very well preserved copy." He referred us to a historical address by the then Chief Justice of the Pennsylvania Supreme Court, the Honorable James T. Mitchell, in this book.

Using original materials, some of

which apparently are not available today, the Chief Justice sets forth these salient facts:

1. Law Library Company founded 1802.

2. The Associated Members of the Bar of Philadelphia Practising in the Supreme Court of Pennsylvania was founded "in 1821, or shortly before", and included "the principal lawyers of the day".

3. On April 2, 1827, the two organizations merged.

The Associated Members, etc., was a *true* bar association from the beginning. It had two standing committees—"censors" and finance. The duties of the Committee of Censors "were to bestow special attention upon the practice of the bar and to report to the association every member whose conduct professionally may be deemed reprehensible", according to Chief Justice Mitchell, and also to seek to improve rules of practice, "but generally to aim at maintaining the purity of professional practice, and to prevent unfair intrusion upon professional rights".

These functions continued after the merger and up to the present day. This means—on the present evidence—that the Philadelphia Bar Association is the oldest continuously functioning bar association in the United States—from 1821 ("or shortly before").

Tracking down another lead supplied by Mr. Hill, we found that the Essex Bar Association in Massachusetts apparently qualified for the title "Second Oldest Continuously Functioning Bar Association in the United States", having been launched in 1856. I visited its home in the stately oak-paneled law library at Salem, Massachusetts, only thirty miles north of the Survey offices in Boston. I talked with its venerable Secretary, Sumner Y. Wheeler, whose experience with the Association goes back fifty years and who helped us obtain photostats of the early records for Dean Pound's use.

But perhaps the returns are not all in yet. In response to a call from its Chairman, Charles H. Burton, the Junior Bar Conference is seeking further information in every state. The Survey and Dean Pound still welcome information. Law Librarian Hill, Chancellor Littleton and Bar Secretary Wheeler are only three of many who have graciously helped. We appreciate this assistance and hopefully anticipate its continuance.

Judge George Rossman Elected to Board of Editors

■ George Rossman, Justice of the Supreme Court of Oregon since 1927 and its Chief Justice from 1947 to 1950, was elected to the Board of Editors of the AMERICAN BAR ASSOCIATION JOURNAL at the 1951 Annual Meeting. The Board of Governors chose Judge Rossman to fill the vacancy on the Board of Editors in place of the late David A. Simmons, of Houston, Texas, whose term expired at the end of the 1951 Annual Meeting.

Judge Rossman was born in Illinois in 1885, but has lived in the Northwest since he was two and one-half years old. His first ambition was to be an architect, and at the age of 17 he entered Whitworth College in Tacoma, Washington, working nights at carpentry and preparing drawings for buildings. Before graduation, he decided to become a lawyer and returned to his native state to enter the University of Chicago Law School.

After being graduated from the Law School in 1910, he returned to Washington to begin the practice of law. Upon his arrival, he found that he was ineligible to take the Washington bar examination because he had not registered with the clerk of the Supreme Court before January 1, 1910, as required by a newly enacted statute. He then went to Oregon and was admitted to its Bar. After seven years of practice in Portland, he was appointed to the Municipal Court in 1917, to the Circuit Court of Multnomah County in 1922, and to the Supreme Court of Oregon in 1927.

He has been active in the American Bar Association, serving as Chairman of the Section of Judicial Administration in 1942, and as Chairman of the Section of Administrative Law in 1947-1948. He was Vice President of the American Judicature Society from 1945 to 1951. He has been a member of the Advisory Board of the JOURNAL since 1947.

Judge Rossman has been deeply interested in the JOURNAL and on occasion has said: "The JOURNAL is and should be one of the most important publications in our country. Any publication which influences the thinking of our profession sways the thoughts of the American people, for it is to the lawyers that the layman turns for guidance upon public issues. The great influence which the JOURNAL possesses demands that it should represent the best that our profession offers."

Judge Rossman is a welcome addition to the Board of Editors of the JOURNAL.

Berger Studio

GEORGE ROSSMAN

Proceedings of the House of Delegates:

September 17-21, 1951

■ This is a detailed summary of the proceedings of the House of Delegates at the Annual Meeting in New York City. In accordance with our custom, it contains the text of all resolutions and recommendations which were approved by the House. Proceedings of the Assembly will appear in a later issue of the *Journal*.

In the first of the six sessions, the House heard the reports of the Treasurer and of the Committees on Budget, American Citizenship, and Ways and Means. It adopted the six-point program stating the long-range objectives of the Association proposed by the Committee on Scope and Correlation and debated the report of the Commission on Organized Crime. Its action on the Commission's recommendations is perhaps one of the most important taken at this meeting.

FIRST SESSION

■ The sixteenth annual meeting of House of Delegates of the American Bar Association, held in connection with the 74th Annual Meeting of the Association, met for its first session on September 17 in the Astor Gallery of the Waldorf-Astoria Hotel in New York City. The meeting convened at 2:00 P.M. with Roy E. Willy, of South Dakota, Chairman of the House of Delegates, presiding.

After the roll call, Glenn M. Coulter, of Michigan, Chairman of the Committee on Credentials and Admissions, reported that his committee had approved the roster of the House as read on the roll call and had affirmed it as being a proper list of members entitled to sit in the House. He reported that his committee had worked with the Committee on Rules and Calendar on certain amendments to the Association's Constitution. The gist of the report of the two committees on this matter and the action taken by the House on their report is summarized at page 865.

Chairman Willy recognized John M. Slaton, of Georgia, who reported the death of Judge Arthur G. Powell, State Delegate from Georgia, and A. L. Merrill, of Idaho, who reported the death of Sam D. Thurman, State Delegate from Utah. The House stood in tribute to the memory of Judge Powell and Mr. Thurman.

Six resolutions were presented by individual members of the House and were referred to the Committee on Draft. The contents of these resolutions and the disposition made of them are reported at page 871.

House Elects Officers for 1951-1952

Joseph D. Stecher, of Ohio, Secretary of the Association, certified the following nominations of officers and members of the Board of Governors:

For President of the Association: Howard L. Barkdull, of Ohio;

For Treasurer of the Association: Harold H. Bredell, of Indiana;

For Secretary of the Association: Joseph D. Stecher, of Ohio;

For member of the Board of Governors for the First Circuit: Allan H. W. Higgins, of Massachusetts;

For member of the Board of Governors for the Second Circuit: Cyril Coleman, of Connecticut;

For member of the Board of Governors for the Sixth Circuit: Donald A. Finkbeiner, of Ohio;

For member of the Board of Governors for the Tenth Circuit: Ross L. Malone, Jr., of New Mexico.

Upon motion regularly made and seconded, the report was adopted.

Edward T. Fairchild, of Wisconsin, gave the report of the Board of Elections, of which he is chairman. It was adopted by the House.

Under Article X, Section 7 of the By-Laws, a new member of the Committee on Scope and Correlation is elected annually at the opening of the annual meeting of the House. Upon nomination of Whitney North Seymour, of New York, the House named Robert W. Upton, of New Hampshire, to this Committee.

Harold H. Bredell Gives Treasurer's Report

Harold H. Bredell, of Indiana, Treasurer of the Association, gave his report to the House. He said that there was a surplus of only $370 in the general fund, despite an increase in dues received of almost $22,000. He explained that expenditures had increased proportionately and declared that the Association would have to continue to increase its income to keep pace with rising costs. The report was received and filed.

Chairman Willy presented the new Director of Activities, Edward B. Love, of Illinois, to the House.

Robert W. Upton, of New Hampshire, Chairman of the Committee on the Budget, made his report. It showed an estimated income of $380,000 for the present year and appropriations of $410,290, including $131,010 for the expense of the

HOUSE OF DELEGATES

Headquarters and $175,630 for general Association expenses; the balance has been apportioned among the Committees and Sections.

Robert V. Bolger, of Pennsylvania, delivered the report of the Committee on American Citizenship in the absence of Chairman John C. Cooper, of New Jersey. Commenting on an award made by Freedoms Foundation to the Committee, he attributed that honor largely to the work of Chairman Cooper. He reported that resolutions were pending in Congress to merge observance of Constitution Day and "I Am an American" Day, as recommended by the Association at the 1950 Annual Meeting.

Program of Long-Range Objectives Is Adopted by House

William J. Jameson, of Montana, reporting for the Committee on Scope and Correlation, of which he is Chairman, said that his Committee had decided to submit a definite unified program of long-range objectives for the Association. The result of this decision was a six-point program. He moved adoption of this program, set forth in the following language of the Committee:

(1) The preservation of representative government in the United States through a program of public education and understanding of the privileges and responsibilities of American citizenship.

(2) The promotion and establishment within the legal profession of organized facilities for the furnishing of legal services to all citizens at a cost within their means.

(3) The improvement of the administration of justice through the selection of qualified judges and adherence to effective standards of judicial administration and administrative procedure.

(4) The maintenance of high standards of legal education and professional conduct to the end that only those properly qualified so to do shall undertake to perform legal service.

(5) The promotion of peace through the development of a system of international law consistent with the rights and liberties of American citizens under the Constitution of the United States.

(6) The coordination and correlation of the activities of the entire organized Bar of the United States.

Commenting upon these recommendations for a long-range program, John Kirkland Clark, of New York, said that political debts are now being paid by appointments to the Federal Bench and that he felt that the Committee might well stress this factor in connection with Point 3 of the long-range objectives.

IN SESSION AT 1951 ANNUAL MEETING

The House voted to adopt the program proposed by the Committee.

W. Eugene Stanley, of Kansas, as chairman of the Committee on Ways and Means, reported that the building fund balance, in cash, in the hands of the Association is $244,308.43. This does not include what might be obtained from a sale of the present Headquarters building, variously estimated at between fifty thousand and ninety thousand dollars. He then called for adoption of a resolution of his Committee disapproving a proposal to increase Association dues from $12 to $16. This proposal to increase dues had been referred to the Committee at the 1950 Annual Meeting and action thereon was postponed at the Mid-Year Meeting of the House. Mr. Stanley said that his Committee had made a survey of Association members which indicated that such an increase would result in a substantial loss of membership. He declared that a campaign to increase the number of patron members would relieve the Association's financial burden without increasing dues. Action on this resolution was not taken until the second session of the House (see page 828.)

Commission on Organized Crime Makes Twenty-One Proposals

The report of the Association's Commission on Organized Crime had been made a special order of business for this session. This Commission was appointed by President Gallagher at the 1950 Annual Meeting at the request of Senator Estes Kefauver, then Chairman of the Special Senate Committee To Investigate Crime in Interstate Commerce. The Commission's report was given by its chairman, Judge Robert P. Patterson, of New York, former Secretary of War. Judge Patterson said that the Commission had studied ways of modernizing the criminal law and criminal procedure and had worked with the Senate committee in devising means of dealing with the problems revealed by the inquiry into organized crime. He reported the appointment of Judge Morris Ploscowe, of New York, as Executive Director of the Commission and a grant of $25,000 by the Rockefeller Foundation to carry on the Commission's work. Judge Patterson sum-

marized the findings of the Senate Committee as follows:

1. The existence of a highly integrated, highly specialized criminal combination.

2. The command this combination has of vast sums of money, on which it pays no taxes, as it successfully thwarts the efforts of the revenue agents.

3. The corruption of local law enforcement agencies which accounts for the power of this criminal combination.

Judge Patterson said that special studies had been conducted, under the sponsorship of the Commission, of criminal procedure in general, particularly as it bears upon organized crime; and of the need for modernization of criminal procedure. His report contained twenty-one recommendations to be acted upon by the House, five of which called for direct action by the organized Bar to combat criminal combinations, and sixteen of which dealt with bills pending in Congress to tighten the federal laws against the national criminal organizations. The first five of the Commission's recommendations were adopted by the House with slight changes in form suggested by the Board of Governors and by members of the House. As amended, these were as follows:

I

RESOLVED, that the American Bar Association Commission on Organized Crime be and it hereby is authorized, in co-operation with the National Conference of Commissioners on Uniform State Laws:

(a) to draft model statutes which will serve as guides for the enactment of more effective state antigambling laws.

(b) to draft model statutes providing for greater state supervision over local law enforcement agencies, the adoption of uniform law enforcement policies and improving the functioning of local law enforcement agencies.

(c) to conduct research studies which will aid in the improvement of state and local criminal law enforcement which touches most particularly on the operations of organized crime.

(d) to cooperate as heretofore with any governmental committee set up for the purpose of investigating organized crime in interstate commerce.

II

RESOLVED, that the American Bar Association Commission on Organized Crime be and it hereby is authorized to continue for another year and to seek from appropriate foundations, as the President and the Chairman of the Commission approve, the funds to carry on its work.

III

RESOLVED, that the American Bar Association recommends that state and local bar associations embark upon a vigorous campaign to eliminate the lawyer who cooperates with criminals, advises them how to evade the criminal law, or who violates approved standards of ethics; and *further resolved* that the American Bar Association take the leadership in developing the facts and formulating the methods to deal with these individuals.

IV

RESOLVED, that the American Bar Association further the establishment of official crime commissions, adequately financed and staffed, in each state to make thorough-going continuing analyses of local problems of organized crime and the efficiency of law enforcement agencies.

V

RESOLVED, that the American Bar Association urges state and local bar associations to further the establishment of citizen groups in the various states, and particularly in metropolitan centers, to keep the public advised concerning crime conditions and the effectiveness of public officials in dealing with them.

House Debates Bills To Deal with Crime

The Commission recommended approval of twelve bills pending before the Congress. The language of the Commission's recommendations is as follows:

RESOLVED, that the American Bar Association approves and recommends the passage by Congress of the bills listed below with a description of their purposes.

BE IT FURTHER RESOLVED, that the Commission on Organized Crime of the American Bar Association be and it is hereby authorized to advocate before the appropriate Congressional Committees, on behalf of this Association, the passage by Congress of the bills hereinafter described:

(1) S. 1563. A bill requiring the licensing by the Federal Communications Commission of persons engaged in the dissemination of information concerning horse or dog racing and other sporting events, by means of interstate and foreign communication facilities, and directing the Commission to refuse licenses to anyone disseminating such information for the purposes of gambling.

(2) S. 1564. A bill making it a Federal crime to transmit over facilities of interstate communication gambling information concerning a sporting event which is obtained without the consent of the person conducting said event.

(3) S. 1624. A bill to prohibit the importing, transporting and mailing of gambling materials, to prohibit the broadcasting of gambling information, to prohibit the transmission of bets or wagers by means of interstate communication, and to prohibit further the transportation of gambling devices in interstate commerce.

(4) S. 1529. A bill requiring gambling houses to keep daily records of gains and losses, and where such houses are illegal, requiring them to keep records of every wager.

(5) S. 1531. A bill requiring taxpayers to retain income tax records for a period of seven years after the time of the transactions to which they relate.

(6) S. 1532. A bill prohibiting the deduction of expenses or losses incurred in illegal wagering transactions.

(7) S. 1660. A bill requiring individuals who report a gross income in excess of $2500 from unlawful business or transactions to file a net worth statement of assets and liabilities.

(8) S. 1661. A bill making punishable the harboring or concealing of an alien who has illegally entered this country.

(9) S. 1662. A bill giving the Attorney General the right to cancel a suspension of deportation, obtained fraudulently by an alien.

(10) S. 1747. A bill to permit the Attorney General to grant immunity to witnesses in grand jury or trial court proceedings when it is in the public interest to do so, so as to make it possible to compel their testimony.

(11) S. 1899. A bill to require the Interstate Commerce Commission to consider the moral fitness of applicants for certificates of necessity and convenience in connection with interstate transportation.

(12) S. 1530. A bill to establish a two-year period of validity for basic permits issued under the Federal Alcohol Administration Act.

The House voted its approval of Nos. 1, 2, 3, 8, 9, 10, 11 and 12. After considerable debate on Nos. 4, 5, 6 and 7, it voted to approve the use of all powers of the Federal Govern-

ment against organized gambling, but referred the recommendations themselves back to the Commission for further study, following a recommendation of the Board of Governors. The Board's position, as explained to the House by Secretary Stecher, was that these proposals were impracticable.

Allan H. W. Higgins, of Massachusetts, Vice Chairman of the Section of Taxation, speaking in favor of the Board of Governors' recommendation as to Nos. 4, 5, 6 and 7, said that the Section of Taxation felt "that these bills very definitely should have further study". No. 4, he said, involved a possible question of unconstitutionality, since it would require a person to admit that he had committed a crime. He declared that its language was so broad that it would apply to any one who might win an automobile in an American Legion raffle. "... The Section of Taxation does not want to help the gangsters and the gamblers", he said, "but we do want to see that honest citizens are protected, and that bills are not endorsed wholesale by the Bar Association without adequate study not only as to what their effect may be on all the citizens, but also as to their workability". He doubted whether it was feasible to require illegal gambling houses to keep records of every wager. He also said that two of the bills were in conflict, since one imposed an excise tax on gross income from gambling and another disallowed all illegal expenses and losses from gambling, so that such income was taxed twice. The Treasury Department also questioned the wisdom of these bills, he said. He pledged the co-operation of his Section to the Commission in an effort at implementing the bills to make them more practicable.

In reply, Judge Patterson said that the bills had been given very careful consideration by his Commission and that several of them had the endorsement of the Department of Justice. If the Commission was to be continued, he thought that it should report directly to the House and not to a Section—he said it was a question of whether these matters were of such urgency as to be handled by a special group, like the Commission, or whether they should be handled by the Standing Committees and Sections of the Association in a normal, routine way. "I don't think you can combine the two methods", he said. "It would strike me as wretched administration to do that."

A. L. Yantis, of Illinois, said that it was undesirable to require a taxpayer to retain his records for a period of seven years, and that No. 5 should not be adopted.

Samuel H. Liberman, of Missouri, said that the question involved was not one of taxation, but of seeking an effective means of dealing with organized crime, and that he did not think a study by the expert Section of Taxation was required.

In reply to a question by Harold J. Gallagher, of New York, Judge Patterson said postponement of action on the recommendations might very well cause delay in the consideration of the four bills by the Congress.

The vote in the House was 60 to 51 in favor of referring the four bills back to the Commission for further study; Chairman Willy ruled that this referral carried endorsement of the principle of the bills.

The next proposal of the Commission was adopted without debate. It was as follows:

> RESOLVED, that the American Bar Association approves S. 1625 with amendment and recommends its passage by Congress, with proposed amendment.
>
> BE IT FURTHER RESOLVED, that the Commission on Organized Crime be and it is hereby authorized to advocate before the appropriate Congressional Committees on behalf of this Association the passage by Congress of S. 1625, hereinafter described, with amendment suggested by this Commission.
>
> S. 1625. A bill to extend the law relating to perjury so as to make the giving of willful contradictory statements on material matter before a grand jury or during the trial of a case, perjury. It is suggested that the bill be amended to include proceedings before Congressional investigative committees.

The purport of the three remaining recommendations of the Commission was to disapprove four bills pending before Congress. The recommendation to disapprove was adopted by the House; it reads as follows:

> RESOLVED, that the American Bar Association disapproves and therefore recommends that Congress reject the bills listed below.
>
> BE IT FURTHER RESOLVED, that the Commission on Organized Crime of the American Bar Association be and it is hereby authorized to advocate before the appropriate Congressional Committees, the defeat of these bills on the grounds hereinafter stated, and to urge that new bills embodying sounder means of achieving the desired purposes be introduced.
>
> S. 1695 and S. 1900. Bills providing increased and mandatory sentences for narcotics users and sellers.
>
> S. J. Resolution 65. A bill providing for the establishment of a Federal Crime Commission in the executive branch of the government, without power of subpoena.
>
> S. 1663. A bill to prohibit the transportation of liquor into local option (dry) areas.

The House then voted to recess.

SECOND SESSION

■ At the second session of the House, the members heard the reports of the Committees on Unauthorized Practice of the Law, Unemployment and Social Security, Retirement Benefits for Lawyers, Public Relations, Communications, Legal Aid Work and Federal Judiciary. It voted to defer action on the proposal to increase Association dues from $12 to $16 per year and approved six changes in the Constitution and By-Laws of the Association.

■ The House convened at 9:30 A.M. on Tuesday September 18, with Chairman Roy E. Willy presiding.

John D. Randall, of Iowa, Chairman of the Committee on Unauthorized Practice of the Law, reporting

for that Committee, called the attention of the members of the House to a recent decision of the Minnesota Supreme Court laying down a rule for determining what constitutes giving legal advice. He said that the life underwriters are co-operating with the Bar in an attempt to eliminate practices that have caused bad feeling between the two groups, particularly in the use of the term "estate planning". A study on unauthorized practice, prepared by a member of the Committee, Edwin M. Otterbourg, of New York, is to be distributed to members of the House, courts, newspaper editors, and legal editors; a supply will be available at the Headquarters Office for sale at $2 a copy.

The House adopted the following resolution of the Committee:

> RESOLVED, That the work of the Standing Committee on Unauthorized Practice of the Law to obtain the co-operation of the Association of American Law Schools, in furthering an educational program in relation to the problems arising due to unauthorized practice of law, be approved and said Committee is expressly authorized to continue its efforts in that direction.

The Committee To Study Communist Tactics and Objectives, speaking through its Chairman, Austin F. Canfield, of the District of Columbia, reported the progress made in the various states in handling the problem of lawyers who are Communists or Communist-sympathizers, as recommended by the Association at the last Mid-Year Meeting of the House. He mentioned a number of bar associations that have taken positive action on the problem. He called the attention of the members of the House to the Committee's "brief" on Marxism-Leninism which sets forth Communism and Communist aims in language taken directly from Red sources. Mr. Canfield declared that it demonstrated beyond a doubt that the Communist movement is not a political party but an international conspiracy. On Mr. Canfield's motion, the House voted to continue the Committee for another year.

James R. Morford, of Delaware, then gave the report of the Committee on Membership. He said that the Committee, under his chairmanship, was undertaking a long-range program to increase the size of the Association. An active campaign will be conducted under a state membership director in each state, he announced, and the Committee expects to conduct intensive drives throughout the country in the course of the next two or three years. He reported that the membership of the Association, as of September 15, was 45,628 with 825 applications pending. There actually were 5,400 new applications during the year, Mr. Morford said, but during the same period 2,015 memberships were lost. Of these, 469 members died and 315 resigned, and such losses must be regarded as normal. He predicted 50,000 members by the time of the next Annual Meeting.

House Votes To Postpone Consideration of Dues Increase

The House then considered the proposal to increase dues from $12 to $16 annually. William W. Evans, of New Jersey, a member of the Budget Committee, was in favor of following the recommendation of the Board of Governors to defer the proposal until the Mid-Year Meeting of the House. He pointed to increased demands for additional finances to carry on the various activities of the Association and said that if, as expected, the increased membership brought in the necessary revenue, the dues would not have to be increased.

W. Eugene Stanley, of Kansas, called for forthright defeat of the increased dues proposal. He said that nothing was being done to obtain more patron members, and that obtaining such memberships would greatly help the financial problem. He said that he was opposed to leaving the matter in suspension so that new members would not know whether they would be called upon to pay $12 dues or $16.

The House voted to follow the recommendation of the Board of Governors to postpone action on increasing dues, thus voting down Mr. Stanley's resolution which would have killed the increase.

Laurence W. DeMuth, of Colorado, Chairman of the Committee on Rights of the Mentally Ill, reported that his Committee was continuing its work on a code of minimum standards of civil rights for the mentally ill. On his motion the House voted to continue the Committee.

The Committee on Unemployment and Social Security had five recommendations which were adopted by the House upon motion of Allen L. Oliver, of Missouri, the Committee's Chairman. They were as follows:

> RESOLVED, That, in view of present general economic conditions, no change be made at this time in the reserve policy of the Federal Old Age and Survivors' Insurance Trust Fund; that we strongly urge, however, that the size of said Trust Fund in relation to the size of the national debt and to general economic conditions be kept under vigilant surveillance by the Congress of the United States so that prompt action to modify this reserve on a long-term basis may be instituted at any time in the future when changing conditions so require; that we further recommend that the Unemployment and Social Security Committee of this Association again review these matters before the effective date of the automatic increase in tax rate under the Federal Contributions Tax Act now scheduled to occur in 1953, to determine whether such increase is advisable in the light of then existing conditions; and
>
> BE IT FURTHER RESOLVED, That the size of the reserves for unemployment benefits credited to the respective accounts of the several states in the Federal Unemployment Trust Fund be regulated by state taxes based on sound experience rating; and
>
> BE IT FURTHER RESOLVED, That we strongly recommend to the Congress of the United States that H.R. 525, H.R. 3391 through H.R. 3396 not be enacted, primarily because such bills would result in (a) unwarranted Federal control of the unemployment insurance system at the expense of free self-government by the several states, and (b) an unnecessary increase in the Federal unemployment insurance tax; and
>
> BE IT FURTHER RESOLVED, That we strongly recommend to the Congress of the United States that H.R. 4138

(Continued on page 864)

New York University

Dedicates Its Law Center

by **Russell D. Niles** • Dean of New York University Law School

■ On September 15, 1951, Arthur T. Vanderbilt Hall was dedicated as the Law Center of New York University. It was fitting that Chief Justice Vanderbilt's many friends in the American Bar Association, his colleagues in the Conference of Chief Justices and his associates in other professional and learned organizations should have been present in New York to celebrate the occasion. At the dinner in the Grand Ballroom of the Waldorf-Astoria concluding the celebration, the supreme courts of forty-four states were represented, mostly by their chief justices, as were the Courts of Appeals of six circuits. These judges were all on the dais, together with other professional leaders who included Gordon Gowling, K.C., President of the Canadian Bar Association; Roger Greene, President of the Incorporated Law Society of Ireland; Sir Leonard Holmes, President of the Law Society of England; Sir Godfrey Russell Vick, K. C., Chairman of the General Council of the Bar; and Philip B. Perlman, the Solicitor General of the United States. On the floor of the ballroom were some 1200 guests of the University, including the Board of Governors of the American Bar Association, the members of its House of Delegates and others in its official family. The presidents of most of the state bar associations were present, as were seven past presidents of the American Bar Association. Over three hundred colleges and universities were officially represented, fifty-one by their presidents, seventy-six by deans and others by prominent graduates. John W. Davis was the toastmaster of the evening. The speakers were Dean Roscoe Pound, Chief Justice Vanderbilt, and Sir Francis Raymond Evershed, Master of the Rolls, of England.

Frank J. Gillooe Agency

NEW YORK UNIVERSITY LAW CENTER

Many of the distinguished company present at the dinner in the evening had attended the symposium earlier in the day in the new building. They had the chance to see the new Law Center on Saturday and during the meeting of the American Bar Association in the following week. Many did so as a personal tribute to Chief Justice Arthur T. Vanderbilt. Theirs was in part a personal tribute and in part a tribute to the Law Center idea which he has done so much to develop.

Arthur T. Vanderbilt Hall is more than a law school building. It is de-

signed to accommodate professional and public affairs related to the law, to offer a forum for the discussion of issues important in the law and to offer research facilities to scholars engaged in projects leading to the reform and simplification of the law. There are facilities for undergraduate law students and graduate and advanced professional students who are already practicing lawyers. The building has enough reserve space for a substantial increase in the activities of the Law Center through the years to come.

Arthur T. Vanderbilt Hall was designed by Eggers and Higgins in the Georgian Colonial style, in part so that the building would harmonize with the traditional architecture of Washington Square and in part because Georgian architecture is almost as functional as modern. The building was restricted to four-and-one-half stories to conform to the traditional building height of the old buildings on Washington Square. The building is in the shape of an "H" with the larger courtyard facing on Washington Square, set off from the Square by a distinctive colonnade. The builder was John Lowry, Inc., builder of the International Building and the Music Hall of Rockefeller Center.

Several features of the building are of special interest. A suite designed to serve the profession occupies the first floor of the west wing. It consists of a separate entrance, a separate lobby, and on the one side an auditorium seating five hundred and on the other side a lounge room known as the Law Club which is as large as the auditorium. The Law Club has a benchers' platform and a separate benchers' room which may be used as a conference room. It is possible to have a professional conference in session without disturbing the essential work of the School of Law.

It might be worth recording how the plan for these public rooms evolved. Our inspiration was of course the Great Hall of one of the Inns of Court. We envisioned law students and their preceptors meeting together in formal and informal gatherings, eating meals together and relaxing together. We thought of lectures, musicales and theatricals—being mindful of the ancient traditions of the "revels". We also thought of motion pictures and television. How could we combine these functions and best take advantage of technical developments in the fields of air conditioning, acoustical engineering and electronic devices? After much thought, we decided it was better to divide the functions of the Great Hall between two rooms. The first is an auditorium with a stage, with footlights and other trappings, including a projection booth complete with coaxial cable for television, and with a public address system built into the ceiling and tied in to the Law Club for overflow audiences. The second, the Law Club, will be the social room. The benchers' platform along one side, we decided, could be used by a speaker who was making a talk to an informal gathering or by entertainers or an orchestra for a school dance.

The usefulness of the auditorium-Law Club suite was demonstrated during the recent American Bar Association meeting. On Monday, September 17, the Conference of Bar Examiners and the Section of Legal Education and Admissions to the Bar had a business session in the auditorium and, following the business session, had a social hour in the Law Club. The American Law Student Association used various classrooms for their discussions, the auditorium for their general meetings and the Law Club for social gatherings. The Section of Real Property, Probate and Trust Law had a buffet supper in the Law Club on Tuesday evening. The Division of Food, Drug and Cosmetic Law had sessions in the auditorium on Wednesday and Thursday mornings. A buffet luncheon in honor of Dr. Paul Dunbar, the retired United States Commissioner of Food and Drugs, took place in the Law Club following the Thursday session.

The heart of the Law Center is, of course, the library which must serve the undergraduate student body, the graduate and professional students and research workers and the faculty. The general plan is decentralization with unified control. The Mills Memorial Library constitutes the entire east wing of the first floor. The main reading room is two hundred feet long, extending the entire block from Washington Square through to Third Street. The room is, however, divided architecturally and functionally so that each unit is pleasing to the eye and is also comfortable and convenient to work in. The reading room is lighted by a complex of baby spotlights with the result that there is a full 35-candle power at table height throughout the room with a minimum of glare and shadow. The room is painted a restful green and is furnished with pickled oak furniture. At the Washington Square end of the library there is an informal reading room furnished in eighteenth century mahogany furniture by way of contrast.

The principal stacks are in the basement and in the sub-basement under the main reading room and are encircled by individual study cubicles, two banks of which have been especially sound-deadened so that they can be used by students who wish to type their manuscripts.

There are two other libraries in the building: one, a library of 15,000 volumes on the third floor for faculty use and another library of approximately the same capacity for the research center on the fourth floor. All five library floors are tied together by a pneumatic tube order system and by electric book lifts in addition to elevators which carry book trucks. The library has a present capacity of 250,000 volumes.

The classrooms are on the second floor so that students may reach them without relying on elevators. Classrooms are wider than they are deep and students are furnished with radial desks arranged in amphitheater style and with swivel seats which enable them to see and hear any student who is reciting. The classrooms are equipped with electronic visual aids which enable an instruc-

tor to use prepared slides or to write on a transparent plate so that what he has prepared or has written is reflected on a white blackboard above the instructor's head.

There are more seminar rooms than classrooms and the seminar rooms are of great variety. The most interesting one, the Inter-American Law Institute Seminar Room, has a pear-shaped modern table, some twenty-seven feet long which will accommodate twenty-five persons around the table and an additional twenty-five in tablet arm chairs in a secondary circle.

There is a small but complete moot courtroom on the third floor, overlooking Washington Square, with an adjoining room for the moot court clerk and with offices nearby for the faculty advisers. The moot courtroom is available at all times for practice trials and appellate arguments and is not needed for a classroom. For the major competitions, such as the finals, the semifinals and the interschool competitions, a separate, folding judge's bench is kept in the wings of the auditorium so that it can be set up on the stage of the auditorium. The faculty offices are also on the third floor near the faculty lounge and library. The faculty lounge and library is one of the most beautiful and distinctive suites in the building. It was made possible by a gift of $55,000 by the faculty of the school as a tribute to Judge Vanderbilt when he retired as dean to become Chief Justice of the Supreme Court of New Jersey. Many valuable items of Vanderbilt memorabilia will be housed in one of the library rooms.

The building also has two student lounges and discussion rooms, serving pantries and kitchens, locker rooms, a suite with shower baths and a steam room, and suites for various student activities and for the various publications of the Law Center. Offices have also been assigned to various affiliated organizations such as the Citizenship Clearing House, the Inter-American Law Institute, the Institute of International Law, the Food Law Program, and the Institute of Judicial Administration.

THE LAW CLUB

The décor of the building is somewhat unusual. We decided that it was possible for a building to be beautiful as well as functional and that it cost no more to have charming and interesting colors than to have the conventional schoolroom colors. We decided that attractive furniture can also be durable and usable. To assist us in the selection of furniture and decorative schemes, we retained a lawyer's wife, Mrs. G. Wallace Bates, who combined skill and sympathy for our objectives. She worked with James McCutcheon and Company, W. and J. Sloane and the architects in planning the pleasing and imaginative decorations and furnishings of the building.

On Saturday morning, September 15, the dedication ceremonies started with a symposium on "The Relation between General Education and Law School Training in the Preparation of a Lawyer". Judge Vanderbilt, as the presiding officer of the first session, set the general tone and scope of the symposium by outlining the characteristics of a lawyer which should be developed in the integrated educational process.

The first topic, "The Humanities and the Law", was discussed by Dr. Earl J. McGrath, United States Commissioner of Education, and formerly Dean of the College of Liberal Arts at the State University of Iowa and later at the University of Chicago. The discussion was continued by Huntington Cairns, Secretary and General Counsel of the National Gallery of Art, and Dr. James Burnham, Professor of Philosophy and author of several provocative books, including *The Managerial Revolution.*

The second topic, "The Natural Sciences and the Law", was the theme of the address by Dr. Detlev W. Bronk, President of Johns Hopkins University and of the National Academy of Sciences. One of his unusual suggestions was that the Law Center might have one resident professor trained in the natural sciences. Harvard Law School took a chance on a botanist once and the experiment was not unsuccessful. Dr. Bronk's paper was commented on by Dr. Frederick L. Hovde, President of Purdue University, and Dr. William R. Dennes, Dean of the Graduate School of the University of California.

At the afternoon session the third topic of the symposium, "The Social Sciences and the Law", was pre-

(Continued on page 860)

AMERICAN BAR ASSOCIATION

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EDITORIAL OFFICE

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■ *Education for the Practice of Law*

The transition in legal training for admission to the Bar from law office study, with emphasis on the practical or "how-to-do-it" side to law school training with almost complete concentration on the theory of the law, was a rapid one. It was so rapid and so complete that practical training was virtually eliminated from the pre-admission education of the law student. The lack of opportunity for intern training for the legal profession, the absence of facilities and the inability on the part of law schools to teach experience, is gradually awakening the profession and the law schools to a need for an effective means for bridging the gap in legal training between the theory of the law and the practice of the law.

Some law schools have endeavored to teach experience but with little if any real success. A few have made progress in teaching a limited number of the so-called legal skills, such as legal drafting, legal writing and legal research. Courses in office practice offer a substantial contribution to the practical training of the law student. Courses of this type, plus the limited number of legal skills that can be taught in law school, still leave the law student far too short on experience and practical training to equip him to step immediately from law school into successful practice.

Law schools have worked on this problem and tossed it about with the hope that eventually some satisfactory form of intern training would be available or another answer would be found. The consideration of this problem always results in approximately the same conclusion—law schools cannot successfully teach experience and under present limitations it is not desirable that they should. The primary objective of law school training is to teach students the basic theories and an accurate application of the fundamental principles of the law. This training is intended to develop sound legal reasoning and analysis. The objective of law school training is too important to permit any substantial digression. The successful teaching of the practical side of the practice of the law must be left to others.

The American Law Institute and the American Bar Association have accomplished much to provide practical training through their "Continuing Legal Education" program. The Practicing Law Institute of New York and the state and local bar associations have made fine contributions in this field. A few law schools and particularly the new "Law Centers" have made outstanding contributions.

During the many years of exploring to find satisfactory answers to the need for practical courses and guides to develop the legal skills of lawyers, there has always been the hope that someone would make the kind of contribution that would be a real landmark—a milestone in the practical education of lawyers. For years we went without a single answer that would meet the need. This was true until Chief Justice Arthur T. Vanderbilt of New Jersey delivered the 1950 John Randolph Tucker Memorial Lectures at Washington and Lee University on "Forensic Persuasion". This lecture was followed by Eustace Cullinan's monograph on "Preparation for Trial of Civil Actions", prepared for the American Law Institute's Continuing Legal Education series on "Trial Practice", and by the 1951 Morrison Foundation Lecture by Associate Justice Robert Jackson on "Advocacy before the United States Supreme Court" delivered in San Francisco during the annual meeting of the State Bar of California.

The wait was a long one, but what outstanding answers these three contributions are to the need that has existed for so long! Justice Jackson in his lecture tells the story of the three stone masons at work on a building who were asked what they were doing and gave these three replies—"I am working for a living"; "I am shaping this stone to a pattern"; "I am building a Cathedral." Like the third mason, Justice Jackson, Chief Justice Vanderbilt and Mr. Cullinan have each built a cathedral in the field of the "how-to-do-it" of the practice of the law.

Mr. Cullinan in his monograph discusses what the lawyer must do before he enters a courtroom to begin the trial of a case. Chief Justice Vanderbilt in his lectures discusses the art of persuading juries and judges. Justice Jackson in his lecture discusses the art of persuading the United States Supreme Court.

So outstanding are these contributions that it is not

too much to hope that all will be required reading for every graduating law student and that practicing lawyers will keep copies of these lectures and the monograph in their law libraries where they can be read and re-read.

Justice Jackson's lecture is printed in this issue of the JOURNAL. It is informative; it is interesting; it is scholarly; it is inspiring; it is an outstanding milestone in the "how-to-do-it" of Advocacy. It is the kind of article that one does not put aside until he has read every word and then looks forward to an opportunity to reread it.

■ *The Secret of Mr. Justice Holmes Again*

In the April, 1950, issue of the JOURNAL appeared an article entitled "The Secret of Mr. Justice Holmes". The secret that the author tried to unravel was the reason for the universal admiration for the Justice in the face of what he called Holmes' materialistic philosophy. That his philosophy *was* materialistic the author took to be demonstrated and the only question was, why the admiration? Other writers have come stoutly to the defense of Holmes and his philosophy. It is in reply to them that Ben W. Palmer in this issue writes on "The Totalitarianism of Mr. Justice Holmes". This article, like the others, should provoke some lively discussion.

■ *Vanishing Constitutions*

An appellate court recently ruled: "Courts do not declare Acts of Assembly unconstitutional even when clearly so, except in cases properly calling for the determination of their validity." It is not difficult to find other judicial utterances which hold that a court will not, upon its own motion, examine a statute for the purpose of determining whether or not it impinges upon constitutional provisions. That point of view, wittingly or unwittingly, guards the questioned statute from attack. Slowly, but surely, a rule is emerging which, upon further development, will prevent statutes from being deemed unconstitutional unless someone has, by a pleading, assailed the statute and has continued his attack by the pursuit of judicially prescribed technique.

The Constitution is the quintessence of benefits which organized society can confer upon the citizen. It provides the citizen with the framework of his government, sets forth in trenchant language the fundamentals of jurisprudence and, through the form of a bill of rights, safeguards the people's liberty. The government created by the Constitution and the liberties safeguarded by the Bill of Rights enable the citizen to develop the nation's natural resources and his own talents. In that way he enjoys life, liberty and the pursuit of happiness.

The integrity of the Constitution is of paramount concern to the state. It transcends in importance the fate of any statute. If the validity of a statute is decided erroneously, a later session of the law-making body can correct the error, but if a constitutional provision withers on the vine, it is lost forever.

Judges take an oath to support the Constitution. It is their highest duty to maintain its supremacy. If the oath does not summon them to the aid of the Constitution, it is impossible to discern a reason for its administration. Chief Justice Marshall, in *Marbury* v. *Madison*, declared: "Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support?" A judge cannot be loyal to his oath if he sees the Constitution violated while he refuses to come to its avail because of the state of the pleadings. That this technical judicial approach is not essential in all cases is shown in the recent decision in *Terminiello* v. *Chicago*, 337 U.S. 1, wherein the majority of the Court held a law unconstitutional, even though the specific question was not raised in the record and was "explicitly disclaimed" (page 9) at the oral argument.

Marbury v. *Madison* would never have been written if today's reluctance to inquire into the validity of legislation had been manifested 148 years ago. The legislation which was held invalid by that decision had not been challenged by any pleading or other means. As Beveridge, in his great work, *The Life of John Marshall*, says: "Nobody ever had questioned the validity of that section of the statute which Marshall now challenged." But Marshall was a man of superior courage, vision and statesmanship. Beveridge pointed out: "One of narrower vision and smaller courage never would have done what Marshall did." Unless judges of the present generation reverse the recent trend, constitutions may become nothing but fading parchments.

As life is always uncertain, and common prudence dictates to every man the necessity of settling his temporal concerns, while it is in his power, and while the mind is calm and undisturbed, I have, since I came to this place (for I had not time to do it before I left home) got Colonel Pendleton to draft a will for me, by the directions I gave him, which will I now enclose. The provision made for you in case of my death will, I hope, be agreeable.

—George Washington to Martha Washington
Philadelphia, June 18, 1775.

THE PRESIDENT'S PAGE

Trout-Ware

HOWARD L. BARKDULL

■ Those who attended the Annual Meeting at New York during the week of September 17 acquired a degree of inspiration as to the Asciation, its activities and its policies, which is difficult to express in printed words. The meeting was outstanding in all respects and constituted a high tribute to Cody Fowler as well as fitting culmination of his year as President.

The six long-range objectives mentioned on this page in last month's JOURNAL received the unanimous approval of the Board of Governors and House of Delegates at the New York meeting. They now constitute a statement of policies toward which the work of the present year will be directed.

Limitation of funds is the principal bottleneck in the expansion of the Association's work, the same being true as to the performance of functions already under way. To provide a greater amount of money for the accomplishment of our objectives, a three-point program has been formulated:

(1) *Additional Regular Memberships* are being sought vigorously by the Membership Committee under the Chairmanship of James R. Morford, whose aim is to surpass last year's record of additions at the rate of eight hundred members per month. This program is certain to result in an extension of our influence among a greater number of lawyers, and in the increased financial ability of the Association.

(2) *Patron and Sustaining Memberships* are being solicited by the Ways and Means Committee under the chairmanship of W. E. Stanley. Members of the Association in a financial position to contribute an amount greater than the regular dues are in this way afforded a means of helping the general program of Association activities, also of building up a fund for the purchase or construction of a new headquarters building. An Amendment to the By-Laws adopted at New York institutes a plan whereby any law firm a majority of whose partners are members of the Association may become a Patron Member upon annual payment of the sum of $250.

(3) *Special Gifts* are being handled by a separate committee of which former President Harold J. Gallagher is Chairman. Active solicitation will be undertaken as soon as the tax situation is clarified.

It is believed that vigorous pursuit of each of these three programs will produce funds sufficient for the development and expansion of the objectives and purposes already agreed upon, as well as the acquisition within the near future of a new Headquarters building. The projected expansion of Association activities, including the rendering of greater service to the public as well as our members, will be a great step forward.

During the week following the Annual Meeting at New York, I had the privilege of addressing the annual meetings of the State Bar of Michigan at Detroit on September 27 and The Missouri Bar at Kansas City on September 28. Both of these were outstanding gatherings, showing that the state bars are already doing their part in carrying out on the state level the objectives of the American Bar Association.

Following the Kansas City meeting I had two days at the Headquarters Office in Chicago and in the following week enjoyed a day at Cincinnati, where I attended a meeting of the Judicial Conference for the Sixth Circuit and extended the greetings of the American Bar Association. That evening, as your President, I delivered my first formal address for the current year in my native State of Ohio at the quarterly meeting of the Cincinnati Bar Association. This was an unusually large and enthusiastic meeting, attended by many illustrious judges, some from outside the Circuit, including our own Judge John J. Parker and Judge Orie L. Phillips. The speakers included Justice Stanley Reed, Attorney General McGrath and Judge Parker. From Cincinnati I went at the direction of the Board of Governors to White Sulphur Springs for a two-day conference at the Greenbrier for the purpose of explaining the program of the American Bar Association.

The lawyers at state bar meetings are displaying genuine enthusiasm for the "brief" on Communism and Communist tactics, released by our Committee To Study Communist Tactics and Objectives at the New York meeting. The same is true as to our American Citizenship bulletins, now being produced in new format, and the work of our Committee on Public Relations. The work of these Committees is an integral part of, and a distinct contribution to, the accomplishment of our stated Association objectives.

The visits of previous Presidents of the Association have established cordial relations with the state Bars, which resulted in my receiving a warm welcome at each point of call.

The executive and administrative work of the Association requires a substantial portion of your President's time. This highly important aspect of my duties requires close attention, and during the first few weeks following the Annual Meeting the volume of my correspondence has been quite heavy. Organization problems at the Headquarters Office are receiving careful study, with a view toward accomplishing the objectives enumerated in my last President's Page. I am happy to report that the work of the Committees and Sections for the current year is well under way.

Books for Lawyers

SO YOU WANT TO BE A LAWYER. *By K. R. Redden. Indianapolis: Bobbs-Merrill Company, Inc. 1951. $2.50. Pages 123.*

CAREER PLANNING IN THE LAW. *By K. R. Redden. Indianapolis: Bobbs-Merrill Company, Inc. 1951. $3.00. Pages 194.*

One of the most perplexing periods in the life of a young lawyer is when he tries to make up his mind how to practice law. He welcomes advice on planning his career at the Bar. Expert advice has recently been published on these two problems of the budding lawyer. Professor Kenneth Robert Redden of the University of Virginia is the author-editor of two books recently published by Bobbs-Merrill Company, Inc., of Indianapolis. The first is entitled *So You Want To Be a Lawyer* and the second, *Career Planning in the Law.*

Professor Redden is admirably qualified to advise on both of these points. He is an experienced personnel worker. He is at present placement director at the University of Virginia. He has been a law practitioner, law teacher and editor. He speaks, therefore, as one having both experience and authority.

The author readily gives credit to numerous other sources for the material which appears in both of these books. His sources include legal articles and editorials published in the AMERICAN BAR ASSOCIATION JOURNAL, Survey reports by the American Bar Association, government publications, Chief Justice Vanderbilt's classic "Report on Prelegal Education", and several articles written in various issues of the University of Virginia and other law reviews. While this method of quotation occasionally involves confusion as to who the original author is, nevertheless this defect is offset by a greater advantage. It is a great asset that this material, most valuable to young law students, is now collected in one place and made readily available to them in two handsomely bound volumes.

Professor Redden is to be commended on furnishing, if not a complete, at least a very adequate picture of the problems faced by the young law student. Here the young student will find answers to what the law is like, what lawyers do, how to tell whether he is qualified to be a lawyer and what to study in order to become a lawyer. There are signposts to the various requirements of the state law examinations. Recent statistics are included to show the income of lawyers as well as the geographical distribution of practicing lawyers.

Career Planning in the Law contains information which is more valuable to the law school graduate than to the law student. Professor Redden reviews the various methods of office organization for law practice as well as the various fields of practice. His collection of material dealing with government law practice deserves special commendation. He carefully avoids dogmatic choices between specialization and general practice, between metropolitan and rural practice, and between solo and firm practice. He acts as a guide, not a judge. Here the student will also find that law study qualifies him for work in other fields related to the law, such as law teaching, law librarian work, editing, publishing, selling, court reporting, etc. Last, but not least, Professor Redden sets forth some very interesting hints to the young lawyer as to how to land a job. Here is practical, realistic, experienced wisdom. Young men will be wise to profit by it.

The young lawyer of tomorrow can no longer say that he does not have an adequate Baedeker for his future career at the Bar. In two attractively bound volumes he now has a fine vocational guidance manual as he begins his march on that ever-lengthening highway of the law.

EUGENE C. GERHART
Binghamton, New York

DESTINATION UNKNOWN. *By Walter Gordon Merritt. New York: Prentice-Hall, Inc. 1951. $5.65 Pages 441.*

Between the time he prosecuted the Danbury Hatters in 1909 and the occasion when he represented General Motors Corporation in 1945 (in connection with the demands of the U.A.W. that the Corporation should open its books to union scrutiny and that wages should be based on the Corporation's ability to pay) Walter Gordon Merritt has been a distinguished advocate of American business and the free enterprise system in dozens of leading cases establishing the principles that today govern the law of strikes and boycotts.

The views of so eminent an authority, concerning the likely future course in the continuing conflict between company management and union management, command attention and interest because of the unique position of the author. As Mr. Merritt points out in his preface, he is "probably the only living person who participated in some of the most outstanding developments" which have shaped the country's labor law, and "the only living person who, through memory or memoranda, has access to important information that sheds light on . . . some of the forgotten but pertinent highlights of the last 50 years".

It is clear to the author that "present-day institutions are not to remain unmodified". Among the factors which lead him to this conclusion are the significant changes,

during the last fifty years, in the attitudes of the Government and of the general public respecting the employment of organized violence by labor unions.

As to the change in the attitude of the executive agencies of the Federal Government, he contrasts the declaration of President Grover Cleveland, that "If it takes the entire Army of the United States to deliver a postal card in Chicago, that card will be delivered", with the incident during a strike at a Wheeling Steel Company plant a few years ago when the United States Post Office Department refused to order its employees to pass a picket line to carry in food which was being sent by parcel post to employees who were strikebound within the plant.

The author finds a similar change in the attitude of the courts. Referring to some of the Supreme Court decisions in the early 1940's, he declares that "by these decisions constitutional walls to protect property were razed and constitutional walls to protect labor were built on the same site".

Mr. Merritt concludes that public opinion is "more tolerant of organized violence during industrial combats" at the present time than at the beginning of this century, and that "people seem more interested in social justice than in law and order".

While, as his title implies, Mr. Merritt does not essay definite predictions as to the destination at which we shall finally arrive, he finds that the recent course has been in the direction of "socialization of business through collective bargaining, supplemented by national laws". He concludes that while the labor movement has been one of the great forces to promote democracy, at the same time (because of the tactics employed by union leaders) it now constitutes the greatest threat to the continuance of democracy and free enterprise; that the area of private management "is being contracted not only by the extension of Government, but by the extension of the rights of workers in the business". As the author puts it, "The labor union movement in the United States is an attack on capitalists but not on capitalism. . . . The question, however, is how long you can attack capitalists without attacking the institution of capitalism."

While some readers will find themselves in disagreement with Mr. Merritt's forthright views on many recurrent problems in the field of labor relations, the author's gift for trenchant, biting phrases enables him to expose deftly the heart of the problems, revealing the underlying issues which must eventually be faced and resolved.

For example, as to suggestions for participation by union representatives in the management of factories, his objection is that "the price of real management-sharing would inevitably spell a lower standard of living. Business can not be operated by debating committees."

As to industry-wide bargaining, he observes that an unfortunate result is "its adverse effect on democratic procedures. It spells the death knell of local bargaining."

Mr. Merritt lays bare the confusion in thinking which results from applying the word "strike" interchangeably to a mere cessation of work and to those industrial disturbances which involve civil rebellion. He says, "The promiscuous use of the word 'strike' has been the cause of much confusion. To use it interchangeably when speaking of the constitutional right to quit work and when speaking of organized strangling of a business misleads the public."

Whether the reader finds himself in enthusiastic support of or bitter opposition to Mr. Merritt's views on these and other current problems, he will read with interest the detailed accounts, based in part on records and memoranda which are inaccessible to most readers, of the factual background of many of the leading labor cases during the last half century. Mr. Merritt describes in detail the events leading to the famous *Danbury Hatters* case, the *Duplex Printing Press* case, the *Bedford Cut Stone* case, the *Decorative Stone Company* case, the *Apex Hosiery* case, and many more recent cases. Likewise, he reports in considerable detail the history of strikes and bargaining in the coal industry and the maritime field. One chapter is devoted to the organizational campaign in the building service field in New York City.

From his fifty years of experience, Mr. Merritt has developed a philosophy of labor relations which can best be expressed in his own words: employers should "do nothing to obstruct legitimate union activities. . . . But peace is not everything. Nothing is ever settled until it is settled right. . . . The only sound objective is a durable peace, not a temporary peace. Firmness for right principles on the part of any group, whether it be employers, unions, or the public, constitutes one indispensable factor for the promotion of industrial self-government."

FRANK E. COOPER

Detroit, Michigan

EUROPE FROM 1914 TO THE PRESENT. *McGraw-Hill Series in History. By V. W. and M. H. Albjerg. New York: McGraw-Hill Book Company, Inc. 1951. $5.50. Pages 856.*

Today when specialization has so severely limited the intellectual horizons of the individual professional by making ever greater demands for deeper analysis and fuller knowledge of more minute areas of human activity, it is essential that some few remember to challenge and question the validity of that very process. It is not meet that the American professional—lawyer, doctor or teacher—forget the general in the process of viewing the specific. The work of the Doctors Albjerg, *Europe from 1914 to the Present*, is constructed on the premise that all human activities, needs and ideas function in a historical frame of reference that rests on evolutionary continuity, and that broadness of knowledge tends to enhance the value to man of the many parts of knowledge regardless of the degree of specialization.

This historical survey reconstructs

in a concise and scholarly, yet interesting and sustaining way, the bitter social and economic frustrations that guided Europe into and through two great conflagrations, and through, too, that part of the period so far expired when vast segments of European people attempted to bargain political liberty for economic and emotional security—and lost all three. Yet this work does not, after the method of the conventional manner, omit or even slight the political problems and issues of the period.

In treating conventional historical material in such an inclusive manner the authors carefully restrained from yielding to the temptation of discussing in abstract terms the vague and often confusing political and social doctrines of Europe of the past three and a half decades. Analysis of the ideas and circumstances of the period is limited by the very ambition and scope of the work, which is to be expected in a work of this nature and in no way detracts from its over-all merit. What little analysis is attempted rests on a solid base of well synthesized factual knowledge. Noteworthy, too, and adding value to the volume is the sensitivity of the integration of the various factors of Continental sociological activity into the over-all historical process. Interest and interpretation are sustained without the usual literary expedients of rumination or philosophical apologetics. The authors side-stepped this pitfall and held to a pragmatic and systematized discussion of each major topic presented for scrutiny while abjuring explorative expeditions into adjacent areas.

The work itself is encyclopedic in its wealth of information on subjects ranging from the background and causes of World War I to the conflicting ideologies that spring from "political religions" and once again threaten—this time not only total war but total physical annihilation. It is recommended for quick, easy and informative reading.

Those desiring a more thoroughgoing study of the period will find in the lists for suggested reading an unsurpassed collection of sources and secondary works expressive of many viewpoints.

PAUL L. HUGHES
De Paul University, Chicago

FEDERAL FOOD, DRUG AND COSMETIC LAW ADMINISTRATIVE REPORTS. 1907-1949. *Introduction by Paul B. Dunbar. Chicago: Commerce Clearing House, Inc. 1951. $22.50. Pages xvi, 1446.*

The first volume in what will be an important record of developments in food law has appeared; it is a compilation of the annual reports of the federal agency charged with the enforcement of the food and drug laws since 1907. This new record of developments in food law is called the *Food Law Institute Series* and is sponsored by the Food Law Institute under the leadership of Charles Wesley Dunn who is known to JOURNAL readers as the Chairman of the Division of Food, Drug and Cosmetic Law of the American Bar Association's Section of Corporation, Banking and Business Law.

Dr. Paul B. Dunbar, until his recent retirement United States Commissioner of Food and Drugs, has contributed an introduction which helpfully traces the administrative metamorphoses of the federal agency responsible for food and drug law enforcement from the Bureau of Chemistry in the Department of Agriculture in 1907 to the Food and Drug Administration of the Federal Security Agency, as it is known today. While the Food and Drugs Act of 1906 is generally taken to mark the beginning of federal activity in the control of food and drugs, Dr. Dunbar points out that the passage of the Act was preceded by over a score of years of scientific investigation of foods as well as enforcement of acts directed against the importation of deleterious foods. On this solid foundation the administration of the 1906 Act began under the leadership of Dr. Harvey W. Wiley, the crusader who had done much to obtain passage of the legislation. Including Dr. Dunbar, only four other men have held the post of federal administrator of the food and drug laws up to Dr. Dunbar's retirement this year, which is a remarkable example of professional tenure in the federal service. Dr. Dunbar's introduction concludes with a summary of the amendments to the 1906 Act, the Federal Food, Drug and Cosmetic Act of 1938 and amendments since that date.

The wealth of material, technological as well as legal, which the reports contain makes summarization impossible, but some matters of special interest should be noted. The second report, covering the first full year of enforcement of the 1906 Act, refers to the "...sympathetic cooperation of the manufacturers..." (page 41), a note repeated in report after report where it is made clear that enforcement action has always been limited to a small minority in the regulated industries.

The replacement of Dr. Wiley in 1912 by Dr. Carl L. Alsberg led to new emphasis on efficient administration of the 1906 Act and to cooperation with state and local officials which is reflected in the reports. The outbreak of World War I found what was still known as the Bureau of Chemistry in a position to furnish extensive services to the Armed Forces and war agencies, an unforeseen consequence of the passage of the Food and Drugs Act. The 1917 report contains (page 366) a useful summary of the first ten years of the Act, as well as early suggestions for improved legislation (page 370). A summary of the first twenty years of food and drug law enforcement in the 1926 report (page 633) again points out the need for statutory revision which is more fully developed in the reports for 1931 (page 741), 1932 (page 779) and subsequent reports during the early years of the New Deal when the Federal Food, Drug and Cosmetic Act of 1938 was being molded slowly in successive sessions of Congress.

The 1938 Act had scarcely become effective when World War II required a reorientation of the work of what was now the Food and Drug

Administration toward wartime requirements. The years 1942 and 1943 are covered by a single report (page 1021), but the activity of subsequent years is fully described, especially the capable manner in which the Food and Drug Administration met the urgent need for high standards in the production of the new antibiotics.

The final report in the volume, 1949, is notable for its simple, lucid account of the basic techniques of enforcement of the food and drug laws which amply justifies to any taxpayer the 3 ½ cents per consumer appropriated annually to the Food and Drug Administration.

No other single volume conveniently assembles these reports which are not all generally available individually, even in many larger libraries. Practicing lawyers in the food and drug law field will find these reports a useful guide to the present Act and to legal historians they will be invaluable in tracing the development of the law.

The original pagination of each annual report is preserved and consecutive pagination is added for the convenient use of the excellent index. The whole volume is a credit to the Food Law Institute and represents a public service which could be usefully performed for other important federal agencies.

WILLIAM TUCKER DEAN, JR.

New York University
New York, New York

APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS. *By Joseph Henry Smith with an Introductory Essay by Julius Goebel, Jr. New York: Columbia University Press. 1951. $10.00. Pages lxi, 770.*

The Foundation for Research in Legal History of Columbia University School of Law continues its scholarly presentation of topics of concern to an appreciation of the backgrounds of our legal history. Increasing interest is now being displayed by the law schools of our country in its legal backgrounds as evidenced by this series and the recently adopted course at Harvard Law School for which course Professor Howe edited some admirably chosen *Readings in American Legal History.*

In the volume under review, we have an extended treatment of the period from the late seventeenth century to the Peace of Paris in 1783, during which time paradoxically the Privy Council "which at one juncture in the evolution of the common law most threatened it" became "a chief instrument in cultivating acceptance of that law in the remote corners of the earth".

The author treats the procedure evolved for colonial appeals upon the analogy of the Channel Islands experience, the regulations and scope of review, a great number of interesting cases, including some involving stubbornly fought boundary disputes between Indian tribes and colonies as well as between colonies themselves and a topic of deep concern to our later constitutional history, namely, the extent to which the Privy Council judicially tested and rejected colonial statutes as contrary to the laws of England. This last subject was rather uncertainly treated at the time, according to our author, who discerningly comments, "Beyond describing the lawmaking power of provincial assemblies as inferior legislation, in the nature of by-laws, and beyond some vague intimations respecting the supremacy of the Crown, little progress in juristic clarification was made. Our own conclusion respecting those contemporary constitutional ideas must consequently be tentative, for they are belated rationalization, and even although based on the practice may not correctly reflect eighteenth century opinion."

By way of conclusion, the author recognizes that the Council had a minatory effect upon provincial courts by its very presence even though "both the Council and the Board of Trade were guilty of indifference in their consistent refusal to overhaul and to clarify the royal gubernatorial instructions" and even though the Council failed "to adhere consistently to deliberately evolved policies". In all, we have an interesting phase of colonial history extensively and well reviewed from scattered source material that required careful sifting.

LESTER E. DENONN

New York, New York

Union Internationale des Avocats

(Continued from page 815)

At the Plenary Session of September 8, Pendleton Beckley, of the United States, addressed the Congress on "Some Aspects of the Difference Between the Anglo-American and the Latin Law with Reference to the Jury, the Proof and the Supreme Court of the United States".

The entertainment program arranged for the members of the Congress included a concert at the Municipal Theatre, attendance at the races for the "Grand Prix de l'Union Internationale des Avocats", several sight-seeing and excursion trips in the vicinity of Rio de Janeiro, receptions by the Foreign Minister and by the Rector of the University of Brazil and a banquet offered by the Brazilian Bar.

At the close of the Congress, Dr. Mederos da Fonseca, who retired as President, was elected by acclamation Permanent Honorary President of the Union.

The Congress elected a new President, Shri S. Nehru, of India, and designated an additional Vice President, Dr. Jose Jacinto Rada, of Peru.

The United States delegates to the Congress were Pendleton Beckley, Vice President of the Union, George H. Owen, Carl Kinkead, Robert A. Winger, Nicholas Doman and Roy A. Pittman.

Review of Recent Supreme Court Decisions

ESCHEAT

State Judgment Escheating Shares of Stock and Stock Dividends Upheld Over Claim That Property Was Taken Without Due Process of Law

▪ *Standard Oil Company* v. *New Jersey*, 341 U. S. 428, 95 L. ed. Adv. Ops. 755, 71 S. Ct. 822, 19 U. S. Law Week 4342. (No. 384, decided May 28, 1951.)

The New Jersey Escheat Act provides that personal property shall escheat upon the death of its owner intestate and without known heirs, or after a fourteen year period during which the owner has remained unknown or the property "wherever situate" has remained unclaimed. Under this statute, the Chancery Division of the state Superior Court decreed that certain unpaid dividends declared upon Standard Oil stock and twelve shares of its common stock be escheated. The Supreme Court of New Jersey affirmed. Standard Oil appealed to the United States Supreme Court, alleging that the decree deprived it of property without due process of law in that it did not protect the company from later liability to the stockholders whose claims to stock and dividends were escheated. The company contended (1) that the notice to possible claimants of the property prescribed by the statute and the notice actually given were so inadequate that the claimants were afforded no reasonable opportunity to learn of the escheat proceeding; (2) that the obligation of the contracts of the persons whose property was escheated was impaired by the statute and the decree; and (3) that the New Jersey courts were without jurisdiction to enter the judgment since neither the shares of stock nor the dividends had a situs in New Jersey for the purpose of escheat.

The Supreme Court affirmed in an opinion delivered by Mr. Justice REED. The statute required that notice of the escheat proceeding "be published in a manner directed by the court and shall also be published once a week for three successive weeks in a newspaper of general circulation designated by the court. . . ." In holding this notice to be adequate, Mr. Justice REED cited cases to show that resort to publication is adequate in cases such as this where it is not reasonably possible or practicable to give more adequate warning.

He rejects the argument that the escheat impaired the obligation of any contract, declaring that the company and the owners of the escheated property had no contractual arrangement between themselves for its disposition in case of the owner's failure to claim his property and that New Jersey was merely exercising her regulatory power over abandoned property.

In rejecting Standard Oil's argument that the dividends and stocks had no situs in New Jersey, Mr. Justice REED relies upon the state's jurisdiction of the corporation. Standard Oil was incorporated in the state, he observes, and was amenable to process there through its designated agent. Choses in action have no spatial or tangible existence, the opinion states, and control over them can only arise from control or power over the persons whose relationships are the source of the rights and obligations. "Since such power exists through the state's jurisdiction of the parties whose dealings have created the chose in action, we need not rely on the concept that the asset represented by the certificate or dividend is where the obligor is found." He continues: "The rights of the owner of the stock and dividends come within the reach of the court by notice, *i. e.*, service by publication; the rights of the appellant by personal service."

He answers Standard's argument that the escheat statute did not protect it from claims by the owners of the escheated property, observing that the notice to the owners was adequate and that the stock and dividends were taken by a valid New Jersey judgment. The full faith and credit clause would bar another state from taking the same debts or demands, he declares.

Mr. Justice FRANKFURTER, joined by Mr. Justice JACKSON, wrote a dissenting opinion in which he suggests that other states—such as the state in which the owner of the property was last domiciled—might assert a valid jurisdiction over the stock or the dividends. He declares that if a state wishes to assert its right to escheat property which by its very nature is not exclusively within its control, other interested states should be parties to the litigation.

Mr. Justice DOUGLAS, joined by Mr. Justice BLACK, also dissented. He declares that possible claims to the escheat of the intangibles might be made by the state of incorporation of the obligor, the state where the last known owner was domiciled, the state where the true residence of the owner was proved to be, the state where the obligor has his main place of business or the state of domicile of the beneficiary. Any of these might constitutionally enact a custodial statute to hold the escheated intangibles pending claims by competing states. Instead, he observes, New Jersey has appropriated the property to her exclusive use.

The cases were argued by Josiah Stryker for the appellant, and by Emerson Richards for the appellee.

STATES

Full Faith and Credit Clause Requires Wisconsin Courts To Entertain Action for Wrongful Death Resulting from Accident Which Occurred in Illinois

▪ *Hughes* v. *Fetter*, 341 U. S. 609, 95 L. ed. Adv. Ops. 822, 71 S. Ct. 980,

Reviews in this issue by Rowland L. Young.

19 U. S. Law Week 4418. (No. 355, decided June 4, 1951.)

Appellant administrator brought this action in a Wisconsin court to recover wrongful damages for the death of one Harold Hughes, who was fatally injured in an automobile accident in Illinois. The trial court entered summary judgment, holding that a Wisconsin statute, which creates a right of action only for deaths caused in that state, barred the action here as a matter of local policy. The Wisconsin Supreme Court affirmed over a contention that the statute, as construed, violated the full faith and credit clause of the Federal Constitution.

On appeal to the Supreme Court of the United States, Mr. Justice BLACK reversed and remanded. He declares that the basic conflict in the case is between the "strong unifying principle embodied in the Full Faith and Credit Clause" and the policy of Wisconsin against permitting her courts to entertain this wrongful death action. In holding that Wisconsin's policy must give way, he finds that she has "no real feeling of antagonism against wrongful death suits in general" and that the policy of Wisconsin cannot be considered an application of the doctrine of *forum non conveniens*. Appellant, the decedent and the individual defendant were all residents of Wisconsin, he points out, the appellant was appointed administrator and the corporate defendant (the insurance company) was created under the laws of that state. While substituted service might have been had in this case in Illinois, Mr. Justice BLACK declares that "in other cases Wisconsin's exclusionary statute might amount to a deprivation of all opportunity to enforce valid death claims created by another state".

Mr. Justice FRANKFURTER, Mr. Justice REED, Mr. Justice JACKSON and Mr. Justice MINTON dissented, joining in an opinion written by Mr. Justice FRANKFURTER. Declaring that the extent to which the full faith and credit clause requires a state to go in recognizing the rights of action created by another is uncertain, Mr. Justice FRANKFURTER notes that a rigid rule is often applied in the field of commercial law, where certainty is of high importance, while the rule is less rigid in workmen's compensation cases, where the forum may have an interest in protecting the workman. In the instant tort action, he says that he sees "no need for fixed rules which would enable the parties, at the time they enter into a transaction, to predict its consequences". He suggests that Wisconsin "may be willing to grant a right of action where witnesses will be available in Wisconsin and the courts are acquainted with a detailed local statute and cases construing it" or that the Wisconsin legislature might have felt that it was better to allow the courts of the state where the accident occurred to construe and apply its own statute. He notes that there is no claim that Wisconsin has discriminated against the citizens of other states or that she has flouted a federal statute. He declares that no reason is stated "why the interest of Illinois is so great that it can force the courts of Wisconsin to grant relief in defiance of their own law".

The case was argued by Samuel Goldenberg for appellants, and by Herbert L. Wible for the appellees.

WAR

Vesting Order of Alien Property Custodian Under Trading with the Enemy Act Does Not Cancel Lien on Enemy-Owned Bank Accounts Created by Attachment by Creditors, Where Attachments Are Not Inconsistent with Purpose of Act

■ *Zittman* v. *McGrath, McCarthy* v. *McGrath*, 341 U. S. 446, 95 L. ed. Adv. Ops. 736, 71 S. Ct. 832, 19 U. S. Law Week 4327. (Nos. 298 and 314, decided May 28, 1951.)

Petitioners Zittman and McCarthy were the holders of claims against two German banks. They caused attachment warrants to be issued by a New York court against accounts of the debtor banks with the Chase National Bank of New York City. They levied upon the accounts and secured default judgments which remained unsatisfied because the attached funds were frozen by Executive Order under the Trading with the Enemy Act, the general effect of which was to forbid "transactions" in the assets of blocked funds, including all "transfers" of such funds. More than four years after the levy of the attachments, the Alien Property Custodian issued vesting orders, which vested in him "that certain debt or other obligation owing to" the German banks "and any and all rights to demand, enforce and collect the same". Chase National Bank notified the Custodian that it could not release the assets due to the outstanding attachment levies. The district court granted the Custodian a declaratory judgment holding that Zittman and McCarthy "obtained no lien or other interest in" the attached accounts and that he was entitled to take the entire balances. The United States Court of Appeals for the Second Circuit affirmed *per curiam* on the sole authority of *Propper* v. *Clark*, 337 U. S. 472, 93 L. ed. Adv. Ops. 1206, 69 S. Ct. 1333, 17 U.S. Law Week 4570 (See 36 A.B.A.J. 54).

The United States Supreme Court reversed in an opinion written by Mr. Justice JACKSON. Under New York law, he finds that the judgment creditors had judgments secured by attachments on balances owned by German aliens, good as against the debtors but subject to the federal licensing before they could be satisfied by transfer of title or possession. The Custodian is charged with preserving and distributing blocked assets for the benefit of American creditors. Mr. Justice JACKSON declares that if, as the Custodian contended, the freezing program put all assets of an alien debtor beyond the reach of an attachment, there could be no adjudications of the validity of American claims and the end would be complete frustration of a large part of the freezing program. He distinguishes *Propper* v. *Clark*, saying that the receiver appointed there to administer the blocked

funds was not appointed as a provisional remedy but was a special statutory receiver in whom state law purported to vest both title and right to possession, which would obviously defeat the federal scheme of controls of the property of enemy aliens. In the instant case, Mr. Justice JACKSON finds that the effect of the state's action was to freeze the funds in question and to prevent their withdrawal or transfer to the use of German nationals. The Custodian contended that no valid rights against the German debtors were acquired because of the freezing program. Declaring that the Custodian had, in effect, put himself in the shoes of the German banks, Mr. Justice JACKSON said that, as against the German debtors, Zittman and McCarthy had secured valid judgments under New York law and that their claims could not be cancelled or annulled under the vesting order, by which the Custodian took only the right, title and interest of the German debtors. He declares that this in no way impairs federal control over alien property, since Zittman and McCarthy could not secure payment without a license from the Custodian. The decision reserves "all federal questions as to recognition by the Custodian of the state law lien, or priority of payment" if the Custodian should see fit to take over the entire fund for administration, as was done in the companion cases reviewed below.

Mr. Justice CLARK took no part in the consideration or decision of the cases.

Mr. Justice DOUGLAS concurred specially, saying that the majority opinion placed control of the federal interest in the licensing power of the Custodian and that the federal policy is in no way subverted by recognition of a lien which can only ripen into a priority if payment would not accrue to the benefit of the enemy.

Mr. Justice REED, joined by Mr. Justice BURTON, wrote an opinion concurring part and dissenting in part. He declares that the only question of importance "is whether a state attachment, obtained on assets previously blocked . . . gives the attaching creditor any right in those assets that displaces the power of the Government to make such disposition or use of the assets as it may ultimately determine is for the best interest of the Nation and its citizens". The majority opinion vests the account in the Custodian without deciding what power he has over its handling or disposition, he declares. "Such uncertainty will hamper administration and be an open invitation to the owners of blocked assets to sell their interest in the blocked property, as the Custodian phrases it, 'to friendly speculators who are willing to buy at a discount and to await payment on the ultimate day of unblocking' ". He says that a valid state judgment is good as between an alien and his creditors, but that it has no compelling power upon the Federal Government. He would modify the decree by inserting a proviso to the effect that "no lien or other interest, except as between the debtor and creditor, was obtained by the attachment proceedings".

The case was argued by Joseph M. Cohen for Zittman, by Henry I. Fillman for McCarthy, and by Ralph S. Spritzer for the respondent.

WAR

Enemy-Owned Bank Accounts Must Be Turned Over to Alien Property Custodian Despite Attachments Levied upon Accounts by Creditors

■ *Zittman* v. *McGrath, McCarthy* v. *McGrath*, 341 U. S. 471, 95 L. ed. Adv. Ops. 750, 71 S. Ct. 846, 19 U. S. Law Week 4335. (Nos. 299 and 315, decided May 28, 1951.)

These were companion cases to Nos. 298 and 314 above, and involved the same parties and most of the same issues, on similar facts. In these cases the funds attached by Zittman and McCarthy were deposited with the Federal Reserve Bank of New York. In addition to the vesting orders served upon the Federal Reserve Bank, the Alien Property Custodian also served a "turnover directive", describing the specific property that he required to be "turned over to the undersigned to be held, administered and accounted for as provided by law" and calling attention to the protection that the Trading with the Enemy Act gives for compliance. No such directive was served upon the Chase National Bank in Nos. 298 and 314. The Federal Reserve Bank refused to release the accounts that had been subjected to the levies and was sustained by the state courts, as in the above cases, on the authority of *Propper* v. *Clark*.

In this case, the Supreme Court affirmed, again speaking through Mr. Justice JACKSON. He describes the difference between the cases in these words: ". . . in the actions involving the Chase Bank the Custodian stepped into the shoes of the German banks and sought to free their titles of the state liens; here he seeks to step into the shoes of the Federal Reserve Bank as possessor of the credits and funds, leaving unadjudicated the effect of such substitution of custody upon the attaching creditors' rights." The statute under which the funds are to be "held, administered and accounted for" by the Custodian is not a confiscation measure, he holds, but rather a liquidation measure for the protection of American creditors. If the Custodian disallows a claim, the claimant may seek relief in the District Court for the District of Columbia. "The transfer of possession of these funds does not purport to work any automatic deprivation of rights of any class of creditors, but takes over the estate for administration." He limits the decision to a holding "that the Custodian has power to possess himself of these funds and to administer them. . . . The consequences, if any, that flow from the substitution of the Custodian in place of the Bank as holder of the funds, upon rights derived from valid state court judgments secured by attachment, are not ripe for determination."

Mr. Justice CLARK took no part in the consideration or determination of the cases.

These cases were argued by the same counsel as in Nos. 298 and 314.

WAR

Award of Sheriff's Claim for Fees for Levying Attachment on Enemy-Owned Bank Accounts Affirmed in Part and Reversed in Part

■ *McCloskey* v. *McGrath*, 341 U. S. 475, 95 L. ed. Adv. Ops. 753, 71 S. Ct. 848, 19 U. S. Law Week 4336. (No. 324, decided May 28, 1951.)

This case was dependent on Nos. 298, 299, 314 and 315, reviewed above. Petitioner is the sheriff who levied the attachments at issue in those cases. He was impleaded by the Custodian as a party defendant and his amended answer read in part: "That if the Court determines that the petitioner is entitled to possession of the property attached by the Sheriff pursuant to the Zittman and McCarthy attachments, any decree to be entered thereon should provide for payment of the Sheriff's statutory poundage fees arising from said attachments. . . ." This claim was denied below by the district court and court of appeals, incidental to their decision of the main causes.

For the Supreme Court, Mr. Justice JACKSON affirmed in part and reversed in part. Declaring that the Court is in doubt as to the precise status of the sheriff's claims under New York law, he says "We have no doubt that, in one form or another, the proper fees of the sheriff should be treated by federal law in the same manner as the attachments and judgments to which they appertain." Accordingly, he reverses the judgment in this case insofar as the sheriff's fees relate to the attachments of the funds held by the Chase National Bank and affirms insofar as they relate to the funds held by the Federal Reserve Bank. He states, however, that his decision is without prejudice to the sheriff's right to have the New York courts determine the status of his fees.

Mr. Justice CLARK took no part in the consideration or decision of the case.

The case was argued by Sidney Posner for the sheriff, and by Ralph S. Spritzer for the respondent.

Tax Notes

■ Prepared by Committee on Publications, Section of Taxation, Harry K. Mansfield, Chairman.

Joint Return by Executor and Surviving Spouse of Decedent

■ The death of a husband or wife does not necessarily mean the loss of the income tax advantages of filing a joint return. The benefits of splitting the income for tax computation purposes are still available for any year prior to death for which a return has not been filed, and also for the year of death. Usually, the executor or administrator signs the joint return with the surviving spouse, although under certain limited circumstances the survivor himself can sign for the decedent. The executor also has the corollary right, if he decides that a joint return is disadvantageous, to disaffirm one which has been filed by the surviving spouse by filing a separate return for the decedent within one year after the due date. (Section 51 (b) (4), Internal Revenue Code).

A cautious executor, however, will want to consult his attorney to determine whether or not he *should* sign a joint return with the decedent's surviving spouse, or whether or not to disaffirm one which has already been filed. If the joint and several liability which he incurs in executing a joint return is greater than the liability established on a separate return for the decedent, it might appear that the executor would save taxes for the survivor only at the cost of mishandling his fiduciary duties. Of course, if the survivor is also the sole beneficiary, his over-all financial position will be improved by the filing of a joint return, and he will be in no position to complain. Only where beneficiaries other than the surviving spouse are involved will there be any reason for the executor to hesitate.

Consider the very common situation where a wife dies, leaving all of her estate, consisting of a substantial amount of nonincome-producing property (land, jewelry, etc.) to her children. The husband has a very large current income and is anxious therefore to have the wife's executor join with him in filing a joint return. If the husband pays the full amount of the tax liability shown on the return, or he and the estate agree upon a division of the payment, and that's the end of it, the executor's cooperation may have actually increased the amount of the distributable estate. But if it develops that the tax liability has been understated on the return and deficiencies and penalties are assessed, the executor may find the government levying against the estate assets, if they are more abundant than those of the husband. In such a case, the disgruntled heirs may call the executor personally to account for the mistake of helping out the decedent's husband.

Faced with such an alarming possibility, a prudent executor may demand assurance that he will be amply protected in filing a joint return with the surviving spouse. In the first place, he will want to know, does he have the legal authority to sign such a return? If the will is silent on the matter, he may look to the state's probate laws for direction, or may turn to the

probate court for guidance. Only two states—Arkansas and Illinois—have enacted legislation specifically endowing an executor with such authority, and both of them apparently contemplate that approval of the probate court be obtained before the return is signed. In other states the probate courts, having limited powers, may be reluctant to give the executor the approval he seeks.

A happier solution might be for the lawyer, in drafting a will, to give the executor the specific power to file a joint return with the surviving spouse. To make the power a mandatory one would make the matter unduly rigid. It would seem preferable to let the executor exercise his own discretion. The testator might also wish to exonerate the executor for any errors of judgment in reaching his decision—although most executors would probably ask for court approval of that decision in any event.

As a practical matter, a testator and the surviving spouse can usually reach an agreement which, if both husband and wife had income in any substantial amount, might save taxes for both of them. Such an agreement would involve tentative calculations of the taxes that would have to be paid if separate returns were filed, and the estate and the survivor would then each pay a proportionate amount of the joint liability. Certainly a joint return under these circumstances—assuming that no deficiencies develop later—would aid in the conservation of the estate assets and result in an advantage to the beneficiaries. It might be well for the lawyer to include in the will a provision empowering the executor to enter into such an agreement with the surviving spouse, as a companion clause to the one authorizing him to sign a joint return.

The tentative calculations of separate tax liabilities are a matter of paramount importance in arriving at an equitable agreement. It should be remembered that a joint return does not always save money. There are three fairly common situations in which the more economical procedure is to file separate returns, and two of them involve factors which are peculiarly applicable in the case of a decedent. (1) If a rate increase occurs after the date of death and before the end of the survivor's taxable year, a joint return requires that part of the decedent's income be taxed at the new rates, while a separate return is based solely on the old rates. *(Cf.* Section 103, 1950 Revenue Act). Such an increase took place in 1950 and will again occur in 1951. (2) Medical expenses incurred by a taxpayer are, of course, deductible only to the extent that they exceed 5 per cent of his adjusted gross income, if he and his spouse are under 65 (Section 23 (x), Internal Revenue Code as amended by the 1951 Revenue Act). If a joint income figure is used, the deduction is apt to be substantially less than if only the decedent's income is considered—unless the maximum amounts are applicable. (3) If both husband and wife have net capital losses, each is allowed to use $1,000 of such loss to offset other income on their separate returns. (Section 117 (d) (2), Internal Revenue Code). In a joint return, however, only one $1,000 deduction is allowed. (Regulation 111, Section 29.117-5 (b).)

Trial computations, bearing these points in mind, are the only way in which an executor can intelligently reach a decision on the fundamental question of whether the filing of a joint return is a desirable course to follow, and are also the only way in which a satisfactory agreement can be reached with the surviving spouse as to a division of joint liability.

Personality factors must also be taken into account—as always—in attempting to draw up provisions to insure a smoothly functioning estate administration. If the executor has interests antagonistic to those of the spouse, the question of whether or not a joint return should be filed must be resolved in an atmosphere which will be far from harmonious. In a recent Pennsylvania case, the testator, with a remarkable indifference to foreseeable consequences, named as the co-executrices of his estate his daughter by his first wife and his "dear friend"—a lady whom he had married in blithe disregard of the fact that his first wife was still living and still undivorced. Filing a joint return would, it developed, save the estate a considerable amount of income taxes, and the daughter was perfectly willing to join with her mother in signing it. The co-executrix, however, refused to cooperate. She contended that the naming of the first wife in the joint return was inconsistent with the decedent's actions and way of life during his lifetime, and would be contrary to the letter and spirit of the Internal Revenue Code. The probate court was called upon to settle the disagreement, and it found the attitude of the co-executrix to be unreasonable and arbitrary. She was therefore ordered to join in the execution of the joint return. *(In the Matter of the Estate of Frank J. Floyd, Deceased,* Orphans' Court of Delaware County, Pennsylvania, No. 113 of 1950, May 2, 1951).

Such extreme conflicts may be rarely encountered, but the case illustrates how the question of filing a joint return may give rise to controversies in the administration of an estate. A conscientious lawyer should make every effort to give a well-chosen executor adequate powers to join with the surviving spouse in the execution of a joint return, so that the potential tax saving to the family group will not be lost because of uncertainties and indecision.

Contributed by committee member William E. Jetter.

Courts, Departments and Agencies

Administrative Law . . . Packers and Stockyards Act . . . primary jurisdiction . . . federal district court cannot enjoin stockyard's removal of dealers' names from its list of those entitled to credit since the questions presented are within the primary jurisdiction of the Secretary of Agriculture.

■ *Kelly et al.* v. *Union Stockyards and Transit Co. of Chicago*, C. A. 7th, August 8, 1951, Lindley, C. J.

Plaintiffs, livestock dealers, were removed from defendant stockyard's "Open Order List", containing the names of dealers to whom it would extend credit, after an investigation by the Department of Agriculture showed that the dealers had bribed weighmasters to report false weights. To restrain execution of the removal order plaintiffs sought a temporary injunction in the District Court. They contended that their removal from the list constituted a discriminatory practice in the rendering of stockyard services, prohibited by §307 of the Act, and that legally they could be put out of business only by the Secretary of Agriculture if he should find them guilty of a violation of the Act. Defendant stockyard company argued that plaintiffs' removal was not a practice, but if it was such a practice the Secretary of Agriculture had exclusive primary jurisdiction, barring injunctive relief.

On appeal, the Court of Appeals affirmed the District Court's denial of the temporary injunction. Section 308 of the Act provides, *inter alia*, that liability for violations of the Act may be enforced either by complaint to the Secretary of Agriculture or by suit in the District Court, and further, that these remedies "shall not in any way abridge" existing remedies but are "in addition to" such remedies. This provision, the Court said, would seem to support the District Court's jurisdiction to issue the injunction. However, the Interstate Commerce Act bears a "close analogy" to the Packers and Stockyards Act, Judge Lindley said, and in *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, the Supreme Court announced the primary jurisdiction doctrine, holding that resort must be had to the Interstate Commerce Commission, an administrative body, before relief for violations could be sought in the courts. Judge Lindley found that the need for uniformity in interpretation and administration which prompted the Supreme Court to announce the doctrine was also present in the case of the Packers and Stockyards Act and so, accordingly, held the primary jurisdiction doctrine applicable in this case.

However, the Court also noted that the jurisdiction of the courts is defeated and the doctrine operative only in those cases where the issues presented involve inquiries of "fact and discretion in technical matters". In the instant case, the Court found that the question of whether defendant's maintenance of an "Open Order List" was a practice in rendering stockyards services was an inquiry into technical matters and, thus, within the primary jurisdiction of the Secretary of Agriculture.

EDITOR'S NOTE: The omission of a citation to United States Law Week or to the appropriate official or unofficial reports in any instance does not mean that the subject matter has not been digested or reported in those publications.

Bail . . . organization acting as bondsman for numerous defendants whom it fails to produce in court held unsatisfactory surety or source of bail for defendant convicted of perjury.

■ *Christoffel* v. *U.S.*, C.A., D.C., September 20, 1951, Stephens, C.J.

Defendant, convicted of perjury, was ordered admitted to bail April 6, 1950, under Rule 46 of the Federal Rules of Criminal Procedure permitting bail pending appeal only if a substantial question for review exists. Ten thousand dollars in United States Treasury Bonds had been deposited for him. However, on August 7, 1951, the Government moved for a cancellation of the bail bond, alleging that the bonds were the property of the Civil Rights Congress and that that organization was not a reliable or satisfactory bondsman since it had failed to secure the attendance of numerous defendants and convicts for whom it has acted in a similar capacity.

After examining affidavits, exhibits and memoranda furnished by the Government and defendant, the Court of Appeals unanimously ruled that "the Civil Rights Congress is not a satisfactory surety and not a satisfactory source of cash or other bail". Defendant argued that the dependability of the Civil Rights Congress as a surety was not material, but the Court replied that "money furnished as bail by an organization shown to have failed to secure the attendance of defendants on bail in other criminal cases in which it has acted as surety is an undependable inducement to the appearance of Christoffel in the instant case".

However, the Court held that having once determined that a substantial question was involved in the case, it could not properly revoke its order admitting defendant to bail or add to the conditions defined therein except upon a showing of factors which would make the de-

fendant's appearance undependable. The Government had failed to make such a showing and its motion that defendant be denied bail or furnish a surety in addition to the deposit of $10,000 was denied. The Court decided, Judge Clark dissenting, that if new bail, satisfactorily complying with the original order, were furnished, defendant might remain at large.

Carriers . . . Interstate Commerce Act . . . railway company's failure to publish changed demurrage rates established under emergency power of Interstate Commerce Commission did not annul their validity.

■ *Armour & Co.* v. *Louisiana Southern Railway Co.*, C.A. 5th, August 4, 1951, Russell, C. J.

Pursuant to §1(15) of the Interstate Commerce Act, which authorizes the Interstate Commerce Commission "to suspend the operation of any or all rules, regulations, or practices then established with respect to car service" in case of a shortage of equipment or other emergency, the Commission, in a service order, prescribed new demurrage rates and ordered their publication as a supplement to appellee railway company's tariff schedule. However, the railway company failed to publish the changed rates and its suit to collect the higher charges prescribed by the service order was defended upon the ground that the published rates were controlling and could be cancelled and made ineffective only by the publication and filing of another schedule.

The Court held that the charges established under §1(15) go into effect even if the railroad disobeys the Commission's order to publish the suspension of the old tariffs and the applicability of the new rates. Relying on *Iversen* v. *U.S.*, 63 F. Supp. 1001, affirmed 327 U.S. 767, it reasoned that the fixing of demurrage rates, which in case of a shortage of freight cars would tend to induce speed in their loading and unloading, related to "rules, regulations and practices" within the emergency powers granted by §1(15). Hence, it followed that the failure of the carrier to comply with the direction to announce the increased demurrage charges did not annul the validity of the suspension of the old charges and the establishment of the new.

Judge Borah dissented, contending that under §6(3) of the Act, once a tariff rate is published and in effect, it can be set aside or changed only by publishing a new tariff. He stated: "The legal rate is the *filed* rate and it is the duty of the carrier to charge and collect the rate precisely as same is contained in the tariffs on file with the Commission . . . . The order of the Commission to publish and file a new tariff naming the new and changed charges for detention of cars, though valid, was not self executing and did not *ipso facto* cancel the published rate on file."

Constitutional Law . . . municipal ordinance banning religious and political speeches in public parks held constitutional on authority of Supreme Court's decision in *Davis* v. *Massachusetts*.

■ *Rhode Island* v. *Fowler*, Rhode Island Sup. Ct., August 10, 1951, Condon, J.

The question presented in this case was whether a municipal ordinance prohibiting political or religious addresses in public parks was unconstitutional because it abridged the rights of freedom of speech, freedom of association and freedom of worship, contrary to the First and Fourteenth Amendments to the Federal Constitution and the state constitution. By a vote of three to two the Court held that the thirty-five-year-old ordinance was a "reasonable police regulation" designed to preserve the parks as public areas for rest and recreation. Justice Condon, writing for the majority, relied on the decision in *Davis* v. *Massachusetts*, 167 U.S. 43, which he said controlled the case at bar. In that case an ordinance forbidding the making of a public address upon any public grounds except by permission of the mayor was unanimously held constitutional. That decision, the Court said, is "more nearly on all fours with the one at bar" than any cited by defendant, and "So long as the *Davis* case stands without being specifically overruled by the supreme court itself, it is difficult for us to say that an ordinance substantially the same as the one involved in the *Davis* case is nevertheless unconstitutional beyond a reasonable doubt."

Defendant claimed that the *Davis* decision had been limited by later cases, among them *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, *Saia* v. *New York*, 334 U. S. 558, and *Niemotko* v. *State of Maryland* and *Kunz* v. *People of the State of New York*, 19 U.S. Law Week 4095 and 4102. After distinguishing these cases, Justice Condon rejected the argument that the ordinance violated rights guaranteed by the state constitution and added that "This court has not given to those guarantees the wide sweep which the federal supreme court in the last decade or two has given to similar guarantees in the first amendment to the federal constitution."

Justice Baker wrote a dissenting opinion in which Justice Capotosto concurred. He believed that the ordinance was prohibitory, not merely regulatory, and further, that the opinion in the *Davis* case "cannot properly be held to govern the instant case". Later decisions by the Supreme Court, Justice Baker declared, "so weakened its effect as an authority that I am unable to accept it as controlling here. . . . The general principles of law applicable to the right of freedom of speech and assembly under the first and fourteenth amendments of the constitution of the United States as set out in such cases and in others, are in substance inconsistent with and contrary to the holding in the *Davis* case."

The President . . . minimum standards prescribed for classification, transmis-

sion and handling by the executive branch of official information which requires safeguarding in the interest of national security.

■ Executive Order 10290 (16 Fed. Reg. 9795).

On September 24, 1951, the President prescribed regulations for the executive branch establishing a system for the safeguarding of official information, the unauthorized disclosure of which might threaten the national security. The regulations establish minimum standards for the classification, transmission and handling of classified security information, but it is directed that they are not to supersede any higher standards established by an appropriate authority.

Four categories of classified security information are established, in descending order of importance to the national security: "Top Secret", "Secret", "Confidential" and "Restricted". Ultimate responsibility for the safeguarding of classified security information rests upon the head of the classifying agency, but the regulations permit him to delegate the functions charged to him.

Rules governing security classification, upgrading, downgrading and declassification are detailed. To avoid overclassification it is directed that security information shall be assigned the lowest classification consistent with its proper protection. The Order further states that the use of the classification "Top Secret" is to be held at an "absolute minimum", and that "The major criterion for the assignment of this classification shall be recognition of the fact that unauthorized disclosure of information so classified would or could cause exceptionally grave danger to the national security." Assigned classifications are to be kept under constant review and action toward downgrading or declassification is to be initiated as soon as conditions warrant. Among other matters considered are limitations on the dissemination of classified security information and rules governing such information's handling, including marking, transmission storage and destruction.

The Order is printed in the *Federal Register* of September 27, 1951, and is effective thirty days after such publication.

Public Utilities . . . Natural Gas Act . . . large integrated company producing natural gas which flows through its own interstate pipe lines for processing and sale to interstate companies for resale is not a "natural gas company" whose rates may be regulated by Federal Power Commission since provisions of Act are inapplicable to "production or gathering of natural gas".

■ *In re Phillips Petroleum Co.*, Dkt. No. G-1148, FPC, August 16, 1951.

In this decision the Federal Power Commission held that Phillips, a large natural gas producing company, was not a "natural-gas company" as that term is defined in the Natural Gas Act and thus, not subject to the Commission's jurisdiction. Phillips transported gas from producing wells through its own pipe lines to processing plants at or near which the gas was sold to interstate pipe line companies for resale. Section 2(6) of the Act defines a "natural-gas company" as one engaged in the "transportation of natural gas in interstate commerce" or the "sale in interstate commerce of such gas for resale". However, under §1(b) the provisions of the Act are made expressly inapplicable to "the production or gathering of natural gas" although neither "production" nor "gathering" is defined. The issue posed was whether the sales and transportation operations of the company came within the exemption of §1 (b).

The Commission extensively reviewed the legislative history of the Act, its own administrative decisions and relevant judicial decisions. It emphasized testimony given prior to the Act's passage showing the congressional intent to permit power over the production and gathering of gas to remain with the states. As for administrative decisions, the Commission stated: "In no case in its history has this Commission held that the Act gives it jurisdiction over a company solely by reason of its movement of gas in interstate commerce or sales in interstate commerce for resale, where such movement or sales take place in the process of production or gathering."

However, in the case of *Interstate Natural Gas Co., Inc.* v. *Federal Power Comm.*, 331 U.S. 682, the Supreme Court affirmed the Commission's action in assuming jurisdiction over a company transporting gas to points where it made sales and deliveries to other companies. In that case the Court stated that the purpose of the exemption in §1 (b) was to preserve the states' power to regulate production and gathering, but then it continued: "Thus, where sales, though technically consummated in interstate commerce, are made during the course of production and gathering and are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory functions, the jurisdiction of the Federal Power Commission does not attach. But such conflicts must be clearly shown." The Commission observed in a footnote that subsequent to that decision legislation was introduced in Congress to remove the Commission's jurisdiction over sales by producers and gatherers. One of them, the so-called Kerr bill, was passed by Congress but was vetoed by the President. More significant statements, the Commission believed, were contained in a later Supreme Court decision, *Federal Power Comm.* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (see 37 A.B.A.J. 763; October, 1951), where the Court held beyond Commission control the sales of certain gas leases, since such leases were "an essential part of production".

Reviewing the facts of the case, the Commission concluded that Phillips' "gathering" operations included the movement of gas from the producing areas to the processing

plants and from the plants to the points where the sales were consummated. Furthermore, stress was placed on the finding that regulation of Phillips' activities would be inconsistent with or constitute an interference with state regulation.

Commissioner Draper, concurring, said that he interpreted statements in the *Interstate Natural Gas Co.* case to mean that sales made in the course of production and gathering are exempt from the Commission's regulation only if they are so closely connected with the incidents of production or gathering that an inconsistency or substantial interference with state regulation would result from the Commission's assumption of jurisdiction. However, in this case he agreed with the majority that such conflict would result from the Commission's regulation of Phillips' operations.

Commissioner Buchanan dissented, relying on the *Interstate* case in which he stated the facts "were for all practical purposes identical to those presented here". In the *Interstate* decision, he said, the Supreme Court held that "sales in interstate commerce even when made during the course of production and gathering are subject to our jurisdiction". The *Panhandle* case did not qualify the *Interstate* decision, he thinks, since it did not involve sales of natural gas but the question as to whether the Commission had authority over undeveloped gas leases.

Torts . . . automobiles . . . motorist who legally parks his car at curb may sue for damages from one who double-parks and prevents him from moving.

■ *Harnik and Harnik* v. *Levine,* Municipal Ct. of the City of N.Y., Borough of Manhattan, First District, August 9, 1951, Wahl, J.

The question confronting the Court in this case was whether a motorist who double-parked his automobile was liable in damages for the discomfort and inconvenience caused thereby to one who had legally parked his car at the curb but was prevented from moving it. Plaintiffs suggested that the $25.00 damages they asked was unimportant since they were primarily seeking a declaration of civil liability on the part of defendant.

Justice Wahl denied defendant's motion for judgment on the pleadings and analogized the case to *Pollak* v. *Public Utilities Comm.* (36 A.B.A.J. 224, March, 1950; 37 A.B.A.J. 613, August, 1951) where it was held that passengers in public conveyances have a right to be free from forced listening to radio commercials. He stated: "If a 'captive audience' has the right to complain of its plight and to pray for relief, so also may a 'captive motorist.' "

However, Justice Wahl said that cases permitting motorists to recover for obstructions in the public highways preventing them from moving have usually suggested that the right of recovery is for false imprisonment and the instant Court did not have jurisdiction of such actions. Nevertheless, it was found that plaintiffs have a cause of action based on nuisance since "Violations of the kind here presented are undoubtedly an evil. They create increasing hazards for the pedestrian and the automobilist."

Trial . . . charge to jury . . . perjury conviction reversed on ground that charge to jury was inadequate . . . court must instruct as to "overt acts" from which jury may infer conflicting oath and belief.

■ *United States* v. *Remington,* C.A. 2d, August 22, 1951, Swan, C.J.

After a jury had found defendant guilty of perjury in testifying before a grand jury that he had never been a member of the Communist Party an appeal was taken which challenged, *inter alia,* the adequacy of the charge to the jury and the correctness of certain rulings made in the course of the trial. The jury charge contained the following instruction: "To find membership in the Communist Party you must find that the defendant performed the act of joining the party. The act of joining is crucial. This is not to say that you must find evidence of the very act of joining the party, but rather from all the evidence you must be convinced beyond a reasonable doubt that he was, in fact, a member of the Communist Party, and was accepted as such by the party." Defendant excepted to this instruction because "the language following the statement that 'the act of joining is crucial' made the charge too 'vague and indefinite' to constitute any definition at all of what facts the jury must find in order to convict the defendant". The Court of Appeals agreed and reversed the judgment on that ground.

Under the statute, 18 USC §1621, the crime of perjury consists of a conflict between an accused's oath and his actual belief and this must be proved by the direct testimony of two witnesses or one corroborated witness. It was the Court's unanimous position that this perjury rule means that the witnesses must testify to some "overt act" from which the jury might "infer" the accused's actual belief. Judge Swan, writing for the Court, stated that the jury instruction did not single out the "overt acts" which would furnish a rational basis for the jury's inference that defendant must have thought that he was a member of the Communist Party. He said: "[I]t is our opinion that the perjury rule requiring direct evidence cannot be applied unless the court specifically declares what are the 'overt' acts which the jury must find, and which the court decides are properly supported under the perjury rule and of themselves form a rational support for finding that the accused's oath and his belief conflicted. In the case at bar this demanded that the judge point out what facts so supported would justify a finding that the accused did not believe that he had never been a member of the Communist party."

If there should be another trial, Judge Swan declared that the government should be compelled to supply the defense with a bill of particulars indicating what evidence

as to "overt acts" would be introduced from which it would be argued that defendant believed himself to be a member of the party. Defendant's pretrial motion requesting a bill of particulars had been denied by the trial court. Moreover, in a new trial defendant should be supplied with the minutes of his testimony before the grand jury and also, the jurors should be instructed that they must be convinced that the accused was a member of the party "at a particular time and place, and if some thought he was at one time only and some at another, they could not convict him". It was further found that the trial court was in error in permitting the prosecutor to make numerous references to the Attorney General's list of subversive organizations during defendant's cross-examination since the Court said that the list was irrelevant to proving defendant's alleged perjury, even if it were shown that he belonged to any organizations listed.

Further Proceedings in Cases Reported in This Division.

■ The following action has been taken in the United States Supreme Court:

CERTIORARI GRANTED, October 8, 1951: *Guessefeldt* v. *McGrath*—War (36 A.B.A.J. 495, June, 1950; 37 A.B.A.J. 536, July, 1951).

CERTIORARI DENIED, October 8, 1951: *American Elastics, Inc.* v. *U.S.*—Government Contracts (37 A.B.A.J. 292; April, 1951).

Department of Legislation

Charles B. Nutting, Editor-in-Charge

■ In view of the increasing participation in the legislative process by lawyers engaged in private practice, the following discussion by Mr. Kernochan should prove of general interest. The author, by reason of his wide experience in the field, is extraordinarily well equipped to give authoritative and practical suggestions to those who are called upon to represent clients in connection with pending legislation.

Congressional Processes: Critical Points and Individual "Pressure"

By John M. Kernochan
Acting Director, Legislative Drafting Research Fund, Columbia University

■ The legislative process in Congress is bread and butter to the lawyer with a legislative mission—the draftsman, legislator or "Washington representative". But it should also be the serious concern of the nonlegislative lawyer. This is so not merely because it is useful in work with federal statutes. Like most individuals, every lawyer at some time will want to follow the progress through Congress of some legislative proposal in which he has a professional's or a citizen's interest. He will want on occasion to send to Congressmen effective letters or telegrams urging or opposing action. In both of such everyday situations, he needs an orderly understanding of at least the main outlines of the process and of its decisive phases.

It may be helpful to think of congressional processes in terms of critical points or stages confronting a bill between introduction and presidential signature. Uncontested bills may pass such stages easily, sometimes by special procedures; contested bills may be in danger at each one.

Standing Committees Are First Major Hurdle

The first critical point for a bill is its consideration by a standing committee of each house. While the standing committee may approve a bill, it may also kill or alter and its influence pervades later processes involving that bill.

To the standing committees is delegated most of the detailed work of investigation, study and formulation done by Congress on a legislative proposal. With or without the aid of public hearings, they digest pressures, arguments, policies and facts, then evaluate and decide. A decision not to act frequently finishes a bill because of difficulties attending the procedures for discharge of a committee. An unfavorable report weighs heavily against a bill. A favorable report, while no guarantee of ultimate success, is an invaluable asset—but then, of course, the bill that comes out of committee may be very different from that which went in.

Of towering importance for the whole process is the standing committee's chairman. Deprived by the Legislative Reorganization Act of 1946 of some of his arbitrary powers to flout the wishes of a committee majority, he retains powers and functions enough to remain the key man for many, if not most, committee bills. He conducts hearings and meetings and serves as link between the party leaders or the policy or steering groups and his committee. Generally, he plays a vital part in postcommittee processes. He can obstruct too: by prolonging hearings, for example, or by offering amendments or competing proposals in committee, or, especially, by failure to exert maximum effort in behalf of a bill after it has left the committee.

Each Chamber Must Be Satisfied

The second critical point for a bill centers upon its consideration by each house of Congress. New perils arise: The bill may be kept from the floor, kept from a vote, amended beyond recognition, returned to committee or voted down.

At this stage, the Speaker of the House, President *pro tem.* of the Senate, the party leaders and policy or steering groups come to the fore. In important ways, standing committee influence makes itself felt. Harried legislators try to read, as a minimum before voting, the formal committee reports on bills at issue. It is generally the committee chairman who negotiates a committee bill to the floor and he often takes charge of the bill there—parrying amendments, explaining, defending. Moreover, a large proportion of floor amendments comes from committee members frustrated in committee.

The two chambers differ significantly in procedure. As to order of business: The Senate's majority policy committee or an informal arrangement may decide. In the House, apart from privileges affecting certain types of business, the Rules Committee controls the most effective method for getting a bill to the floor: the grant of a special rule. From this control stems not only a procedural power to speed or obstruct but also a power over substance. Beginning last March, emergency food relief for India (H.R. 3017) was held up in Rules for weeks. No special rule was forthcoming until the standing committee offered an altered bill (H.R. 3791) providing relief by loan rather than by grant—a proposal said to have been originally defeated twenty-three to four in that committee. Rules usually works closely with the Speaker and the party leaders on the majority program, unless regional or party splits interfere.

As to floor consideration: Tight House rules bar delay, restrict debate and amendment. The Rules Committee's special rule is often hedged with limitations that bring an early vote. By contrast, Senate freedom of debate and amendment is prey to dilatory floor tactics. Of this, the filibuster is a notorious example, hardly curbed by the current cloture (antifilibuster) rule.

Conferences and the Executive Veto Provide Further Tests

The third critical point is interhouse co-ordination. Even where parallel bills are used, differences between the houses are not uncommon. A bill may fail if the houses cannot agree; compromise may change it radically.

The usual machinery for eliminating differences over a bill is the conference committee, composed of three or more conferees from each house. Emphasizing again the standing committee's central role is the fact that the chairman and the ranking majority and minority members of that committee are generally selected for the conference committee.

Conferences are secret and typically meet under stress. While authority to compromise is limited to matters in disagreement, substantial amendments are possible. However, specific instructions may restrict the conferees further. If deadlock occurs, it can sink the bill or breed further instructions and conferences. A conference report or bill gets prompt consideration in each house. Sometimes pressures for acceptance are overwhelming. Working against a deadline, the Senate on July 27 approved the substantially amended conference version of the Defense Production Act Amendments of 1951 (S.1717) some two hours after the conferees had completed their work.

The final critical point is presidential consideration. On the whole process preceding this point the President and his administrative right arm exert a powerful influence. Ultimately, his approval makes an act law; his veto, unless overridden, destroys it.

Critical Points Suggest Ideas for Individual Advocacy

The foregoing discussion of "critical" points should indicate something about what might be termed "pressure" points.

Today, lobbies blanket the whole process with pressures ranging from grass-roots campaigns that reach every Congressman to personal contacts with key figures. Perhaps the lawyer or other individual anxious to exhort Congress about a bill in which he has a special interest can find some lobbying organization through which to urge his views.

If, as frequently happens, he cannot, he must practice economy of means. He must look for the key figures and for points where the fewest exercise most control. The preceding review should suggest timing to him, and, as appropriate "pressure" points: first and foremost, the standing committees and their chairmen; then, also, Senate Policy Committees; House Rules Committee; party leaders; presiding officers; members in charge of a bill on the floor; conferees; and finally, the President. The job is simpler than it appears, for certain legislators are likely to fill more than one role. If the individual's own Senators and Representatives are concerned, so much the better. In any case, he will want to communicate with them before floor votes in their respective chambers. He will also want to learn some things everyone should know about his Congressmen: what committees they are on; what congressional offices, if any, they hold; and how they vote.

He will be comforted to know that Congressmen themselves insist that a single sincere personal letter counts more with them than numerous mechanical expressions evoked by an organized drive. A large number of genuine communications may take an undecided Congressman off the fence. The chance is possibly a long one, but if one cares deeply about the issues involved, it seems worth taking.

THE DEVELOPMENT OF INTERNATIONAL LAW

Richard Young · Editor-in-Charge

The 1951 Session of the International Law Commission

■ The International Law Commission of the United Nations met this summer in Geneva for its third session, lasting from May 16 to July 27. Twelve of the fifteen members were present, the Russian, Czech, and Indian members being unable to attend. J. L. Brierly, of the United Kingdom, served as chairman; the American member was Judge Manley O. Hudson. A total of fifty-three meetings was held, during which an agenda of eleven items was dealt with.

Of the topics discussed, a number were of small consequence or were only in early stages of consideration. With three questions of importance, however, the Commission dealt in substantial fashion, and the views which it formulated may be influential in the future development of the law on these topics. These three were the problem of reservations to multilateral conventions, the question of the continental shelf and related subjects and the formulation of a draft code of offenses "against the peace and security of mankind". An account of the Commission's views on these matters may be of interest.

Reservations Made by a State to Multilateral Conventions

The effect to be attributed to reservations made by a state in signing, ratifying or acceding to a multilateral convention is a knotty problem and one of great current importance because of the increasing number of such conventions. A considerable diversity of opinion and practice has existed on the question whether such reservations should be regarded as wholly unacceptable, as acceptable and effective under certain conditions or as wholly permissible without restriction. In addition to the substantive effects of reservations, there are also difficult procedural problems, such as that of ascertaining the acceptance or non-acceptance of reservations by other parties to a convention.

In its inquiry into the subject pursuant to a 1950 resolution of the General Assembly, the International Law Commission found that several different methods of dealing with reservations existed in the practice of various international organizations. For example, the conventions prepared by the International Labor Organization in accordance with its special procedures are not open to reservation when proposed in final form. On the other hand, in the practice of the Organization of American States, a state is free to become a party to a multilateral convention subject to any reservation it may wish to make; but it is expected to submit any proposed reservation beforehand to the Pan American Union, to be transmitted to other states concerned for their comments. The result of this method is to encourage wide acceptance, but often on varying terms which may be summed up as follows:

(1) Between states which ratify without reservations, a convention is in force in accordance with its original terms;

(2) Between states which ratify with reservations and states parties which accept those reservations, a convention is in force as modified by those reservations;

(3) Between states which ratify with reservations and states parties which do not accept the reservations, a convention is not in force.

The established practice of the League of Nations was that a reservation, to be valid, must be accepted by all the contracting parties; otherwise the reservation, like the act to which it was attached, was null and void. This rule has been followed substantially by the Secretary General of the United Nations with respect to conventions of which he is depositary. For convenience, it is the practice of the Secretary General, in notifying a state of a reservation made by another state, to advise it that he will regard it as accepting the reservation unless it enters a positive objection thereto.

A still different view was taken by the International Court of Justice in its advisory opinion of May 28, 1951, on the question of reservations to the Genocide Convention. By a vote of seven judges to five, the Court adopted the principle that a reservation objected to by one or more parties should be tested by its compatibility with the object and purpose of the Convention. So if a state party to the Convention deems a reservation incompatible, it may regard the reserving state as not a party to the convention; but if it deems the reservation compatible, it may regard the reserving state as a party. The Court emphasized that its opinion was limited strictly to the Genocide Convention.

After reviewing these various approaches in the light of its duty to promote the progressive development of international law, the Commission came to the conclusion that "multilateral conventions are so diversified in character and object that . . . no single rule uniformly applied can be wholly satisfactory". It noted that in some instances it might be desirable to seek the widest possible acceptance for a convention, even subject to reservations; in others, uniformity of obligation might be essential to the usefulness of the instrument, and its integrity more important than universality. The Commission therefore urged that express rules on reservations, tailored to fit the particular need, be incorporated

in each multilateral convention during its preparation.

For general guidance the Commission went on in its report to propose certain rules of practice which it deemed to be not unsatisfactory for application in the majority of cases. These rules follow on the whole the existing practice of the Secretary General in preference to any of the other approaches outlined above: a state seeking to become, with reservations, a party to a convention may become such a party only in the absence of objection to its reservations by any other state party to the convention. If the reserving state succeeds in becoming a party on these terms, it is the view of the Commission that the convention, as between the reserving state and the other parties, is effectively modified by the reservation.

The Legal Status of the Continental Shelf

In connection with its continuing study of the regime of the high seas, the Commission approved draft articles dealing with the legal status of the continental shelf and related subjects, and determined to communicate these drafts to governments for comment. In the drafts seven articles are concerned with the continental shelf and four with the related subjects of resources of the sea, sedentary fisheries and contiguous zones.

Article 1 defines the continental shelf, in a legal sense, as

> the sea-bed and subsoil of the submarine areas contiguous to the coast, but outside the areas of territorial waters, where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea-bed and subsoil.

and Article 2 declares that the shelf

> is subject to the exercise by the coastal State of control and jurisdiction for the purpose of exploring it and exploiting its natural resources.

As the Commission's comment points out, these articles make no attempt to embody the various scientific notions of the continental shelf or to adopt any fixed limit for the shelf in terms of depth or width: they emphasize the pragmatic test of accessibility for exploitation. The drafts likewise stress that the right recognized is limited to the sea-bed and subsoil and that it exists for the purpose of developing the natural resources therein.

Articles 3 and 4 affirm that control and jurisdiction over the continental shelf cannot affect the status of the superjacent waters as high seas or the status of the airspace above. Article 5 preserves the right to establish and maintain submarine cables. Article 6 declares that continental shelf development "must not result in substantial interference with navigation and fishing" and that development installations shall not be considered islands for the purpose of delimiting territorial waters. Article 7 provides that states sharing the same continental shelf should establish boundaries therein by agreement or, failing agreement, by arbitration.

In dealing with related subjects, the Commission took the view that the development and conservation of resources in the sea, including fisheries and sedentary fisheries, were a matter distinct from the development of the resources of the continental shelf and should be regulated separately. It therefore proceeded, in its draft Article 1 on the subject, to declare that

> States whose nationals are engaged in fishing in any area of the high seas may regulate and control fishing activities in such area for the purpose of preserving its resources from extermination. If the nationals of several States are thus engaged in an area, such measures shall be taken only by those States in concert; if the nationals of only one State are thus engaged in a given area, that State may take such measures in the area. If any part of an area is situated within 100 miles of the territorial waters of a coastal State, that State is entitled to take part on an equal footing in any system of regulation, even though its nationals do not carry on fishing in the area. In no circumstances, however, may an area be closed to nationals of other States wishing to engage in fishing activities.

With regard to sedentary fisheries in particular, the Commission proposed in its draft Article 3 that

> The regulation of sedentary fisheries may be undertaken by a State in areas of the high seas contiguous to its territorial waters, where such fisheries have long been maintained and conducted by nationals of that State, provided that non-nationals are permitted to participate in the fishing activities on an equal footing with nationals. Such regulation will, however, not affect the general status of the areas as high seas.

It may be observed that there is considerable similarity between these provisions and the principles laid down in President Truman's proclamation on fisheries of September 28, 1945. That proclamation, it will be recalled, claimed for the United States the power to regulate fisheries regardless of site, the power to be exclusive over a fishery wholly in American hands, and joint wherever other states also participated.

Draft Code of Offenses Completed at 1951 Session

On the third major topic to be completed at its 1951 session, the "Draft Code of Offences against the Peace and Security of Mankind", the Commission's work was perhaps not so successful. Yet the draft, which was the product of more than two years' consideration, is worthy of study even if only as an example of the difficulties involved in any such effort.

In preparing the draft, which consists of five articles, the Commission decided that the code should deal only with offenses for which individuals could be held responsible and "which contain a political element and which endanger or disturb the maintenance of international peace and security". This principle is enunciated in Article 1, which reads

> Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punishable.

Article 2 specifies twelve acts which constitute such offenses, and Article 3 declares that the official position of any person does not relieve him from criminal responsibility therefor. Article 4 provides that superior orders are no defense, pro-

(Continued on page 854)

OUR YOUNGER LAWYERS

Robert A. Stuart, Secretary and Editor-in-Charge, Springfield, Illinois

Blackstone Studio

PAUL W. LASHLY

Herbert Georg Studio

ROBERT A. STUART

■ The Annual Meeting of the Junior Bar Conference was held at the Belmont-Plaza Hotel, New York City, from September 15 through September 18, 1951, at which time the new officers for the Conference year 1952 were elected. Paul W. Lashly, of St. Louis, Missouri, was named National Chairman, with Richard H. Bowerman, of New Haven, Connecticut, as National Vice Chairman, and Robert A. Stuart, of Springfield, Illinois, National Secretary. Elected at the same time were Milton Stanzler, Providence, Rhode Island, Council Member for the First Circuit; Merritt Lane, Jr., Newark, New Jersey, Council Member for the Third Circuit; Thomas G. Greaves, Jr., Mobile, Alabama, Council Member for the Fifth Circuit; Stanley B. Balbach, Urbana, Illinois, Council Member for the Seventh Circuit; Frank E. Day, Portland, Oregon, to succeed himself as Council Member for the Ninth Circuit; Bryce Rea, Jr., Council Member for the District of Columbia; Wiley E. Mayne, Sioux City, Iowa, to complete the unexpired term caused by the resignation of John H. Lashly as Council Member for the Eighth Circuit; Robert G. Storey, Jr., of Dallas, Texas, as Member of the Council at Large for the Fifth and Eighth Circuits and Charles Davis, of Topeka, Kansas, to complete the unexpired term of Member of Council at Large for the Ninth and Tenth Circuits.

An excellent discussion of problems relating to bar activities was led at the morning meeting on September 16 by Bert H. Early, of Huntington, West Virginia; S. Michael Schatz, of Hartford, Connecticut; Thomas H. Law, of Fort Worth, Texas; Edwin B. Wynn, of Dallas, Texas, and Charles W. Joiner of Ann Arbor, Michigan.

Charles E. Wilson, the Director of Defense Mobilization, addressed the members of the Conference at a luncheon held on Sunday, September 16. The address was broadcast over the nationwide facilities of the Mutual Broadcasting System. Mr. Wilson made a report of the current status of the defense mobilization effort and spoke of the part to be played by the Conference in bringing the facts of mobilization to the attention of the country through an active speaking campaign.

At a luncheon on Tuesday, September 18, held in conjunction with the Section of International and Comparative Law, the principal address, again broadcast nationally over the Mutual System, was given by Thomas E. Dewey, Governor of the State of New York. Governor Dewey, as a result of his recent extensive tour of the Pacific areas, outlined in great detail a plan for the protection of those areas similar to the Atlantic Pact and designed to prevent outside interference in the affairs of such strategic areas as the Indonesian Islands, the Philippines, Formosa, Okinawa and the islands of the Japanese homeland.

The Conference held its traditional dinner dance in the East Ballroom of the Commodore Hotel on September 18.

The Award of Merit for general excellence in bar activities was awarded to the State of Michigan, with Honorable Mention to the State of Texas. The Junior Bar of the District of Columbia was given an award of Special Proficiency, as the Committee on Awards felt that because of its size, it could not compete equally with those in the bar associations of the states. A special Award of Achievement was given to the Junior Bar of Connecticut for its progress in the short period of its existence.

BAR ACTIVITIES

Paul B. DeWitt • Editor-in-Charge

▪ The Junior Bar Section of the Michigan State Bar has again sponsored a placement program for graduates and summer clerks. Carried on extensively in previous years, the program was improved this year by the work of Theodore Souris, of Detroit, State Chairman of the Committee on Relations with Law Students. Surveys were conducted in all population centers of the state subsequent to an announcement in the *Michigan State Bar Journal*. In most areas members of Mr. Souris' committee conducted personal surveys of practitioners and firms. The survey was conducted in Grand Rapids and Detroit by 350 mailed questionnaires.

The survey sought to determine actual openings for permanent location of new graduates, and openings for service of undergraduate students as law clerks during the summer vacation period. The survey disclosed seventeen permanent placement possibilities in Pontiac, Lansing, Grand Rapids and Detroit. Also available in the state were nine positions for summer clerkships.

Upon completion of the survey, the law schools were informed as to placement possibilities and as to the identity of local Junior Bar representatives available for contact by inquiring students and graduates. No record is extant as to the number of contacts and inquiries made by students, but to date seven placements have been made.

▪ The National Legal Aid Association Committee on Service to the Armed Forces has concluded a special project under the direction of Associate Professor Vincent Lo Lordo of New York Law School—a complete revision of a chart prepared by Professor Lo Lordo during World War II which proved indispensable to legal assistance officers, especially those stationed overseas. This work was undertaken at the special request of the American Bar Association's Committee on Legal Service to the Armed Forces and the Chiefs of Legal Assistance of the Army, Navy and Air Force. The chart gives grounds and procedures for divorce, annulment and separation for forty-eight states and the District of Columbia and also information on marriage. Copies are being distributed to member organizations and are available to all members on request. Others may obtain copies at 25 cents each from the National Legal Aid Association, 36 West 44th Street, New York 18, N. Y.

▪ Many smaller bar associations find difficulty in securing outstanding speakers because of their distance from larger cities and the inability to pay speakers' traveling expenses. One solution is the use of the Library of Recorded Speeches which the American Judicature Society has built up over the past few years. These recordings, on either wire or tape, are available without charge, except for postage. A list of the recordings and information follows:

No.	*Min.*	*Speaker, Title and Synopsis*
1-W	45	*Harold J. Gallagher,* New York, New York, then President of the
1-T	30	American Bar Association. Address before the State Bar of Michigan, Detroit, September, 1949. Exposition of Mr. Gallagher's proposal, which was a major theme of his American Bar Association administration, for closer integration of the activities of state and local bar associations with those of the American Bar Association.
2-T	30	*Harold J. Gallagher.* "Essentials for the Administration of Justice".
2-W	30	Address at Judiciary Dinner of the United States, Washington, D.C., September, 1950. Various practical suggestions, with emphasis on selection of judges and especially impartiality in judicial appointments.
3-T	30	*Harold J. Gallagher.* "American Liberalism at the Crossroads". An-
3-W	30	nual address as President of the American Bar Association, Washington, D.C., September, 1950.
4-T	30	*Albert J. Harno,* Urbana, Illinois. Dean, University of Illinois, Col-
4-W	30	lege of Law. "The Balance Sheet of the Profession". Address before Illinois State Bar Association, Rockford, Illinois, June, 1949. Dean Harno measures the legal profession against public statements of both friends and critics and finds a credit balance, but with room for improvement.
5-W	45	*Carl B. Rix,* Milwaukee, Wis. Former President of the American Bar
5-T	30	Association. "Human Rights and International Law". Address before State Bar of Michigan, Detroit, September, 1949. Views of a distinguished authority on human rights issues under discussion in the United Nations.
6-W	15	*Carlos P. Romulo,* Republic of the Philippines, then President of the
6-T	15	United Nations General Assembly. "Natural Law and International Law". Address delivered via radio from New York to Natural Law Institute, Notre Dame University, December, 1949.
7-W	45	*Reginald Heber Smith,* Boston, Massachusetts. Director, Survey of
7-T	30	the Legal Profession. Address before a section meeting of The Association of the Bar of the City of New York, January, 1950. Informal summary of progress of the Survey to that date, with review of its methods and objectives.
8-T	50	*Edwin M. Otterbourg,* New York. Member and former chairman,
8-W	50	American Bar Association Committee on Unauthorized Practice of the Law. "The Legal Profession, Illegal Law Practice, and Educating the Public to Protect Itself". Address before Maryland State Bar Association, Atlantic City, June, 1950.
9-T	20	*Tom C. Clark,* Associate Justice of the United State Supreme Court.
9-W	20	"Legislative Responsibility for Court Reform". Address before the Judiciary Dinner of the United States, Washington, D.C., September, 1950. Because of the lateness of the hour, Mr. Justice Clark delivered orally only the highlights of his address, the full text of which appears in the December, 1950, AMERICAN BAR ASSOCIATION JOURNAL. The recorded summary is interesting and witty.

10-W	40	*Glenn R. Winters,* Ann Arbor, Mich. Secretary-Treasurer, American
10-T	30	Judicature Society; editor, *Journal of the American Judicature Society.* "The Legal Profession and the Public". Address before Columbus Bar Association, Columbus, Ohio, March, 1949.
11-T	30	*Glenn R. Winters.* "Legal Service for All". Address before the Dallas
11-W	30	Bar Association, Dallas, Texas, November, 1949. Historical review and appraisal of the entire legal aid and lawyer reference program, with comments on the English Legal Aid and Advice Scheme and proposals for government legal aid in this country.
12-T	110	*Mock trial* staged before the Wolverine Boys' State, Lansing, Michi-
12-W	110	gan, June, 1950, by a staff of prominent lawyers and judges, including the Attorney General of Michigan, under the sponsorship of the State Bar of Michigan. A defendant is tried before a jury drawn from the Boys' State on charges of having perjured himself by stating in naturalization proceedings that he had never been a member of the Communist Party. An informative demonstration of trial procedure, along with dramatization of legal rights of minorities in a democracy, presented in a form to interest young people.

Instructions for Ordering and Use

Address: American Judicature Society, 428 Hutchins Hall, Ann Arbor, Michigan.

Please give the following information when ordering recordings: 1. First and second choices. 2. Wire or tape. 3. Name of instrument to be used. 4. Date of meeting. 5. Name of organization. 6. Approximate attendance. 7. Name and address of person to whom shipment is to be made.

Tape recordings are on 3M Type 111-B outside coated plastic tape, in 1200-foot spools, recorded at standard speed of 7½ inches per second. This tape may be used on Type A, inside coated, machines by rewinding with coating in. Wire recordings are on Webster-Chicago standard recording wire. Be sure that your instrument uses standard gauge wire. All recordings are offered in both wire and tape. The number first shown indicates the original recording. Since the maximum length of tape is 30 minutes, some wire recordings have been reduced to that length for transfer to tape. The longer ones are on more than one spool.

There is no charge except for postage. Recordings are subject to first class postage rates and postage must be prepaid. If the presentation is to a legal audience, you are requested to distribute literature of the American Judicature Society which will be sent with the recording. Unless other shipping directions are enclosed, please return by first class mail immediately after use. A letter with comments and constructive suggestions will be appreciated.

■ More than 600 lawyers attended the 57th annual convention of the Iowa State Bar Association in Des Moines in June. Justice Tom C. Clark of the Supreme Court of the United States spoke at the annual banquet. Justice Clark urged the Iowa State Bar Association to extend every effort to remove the selection of Iowa judges from politics and to speed up the work of the state courts. The Justice recommended the American Bar Association plan of judicial selection, commonly referred to as the "Missouri Plan".

Preceding Justice Clark's address, the fifth annual award of merit of the Iowa State Bar Association was presented to George C. Murray of Sheldon. The award, a sterling silver service plate over 140 years old and wrought by one of the most delicate craftsmen of nineteenth-century England, was awarded to Mr. Murray "in recognition of personal standards and accomplishments as a lawyer and as a citizen, with many years of outstanding service to this Association".

Ingalls Swisher of Iowa City was named President of the Association and E. W. McNeil of Montezuma, Vice President.

Development of International Law

(Continued from page 851)

vided that a moral choice was in fact possible. Article 5 states that penalties "shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offense".

The twelve acts described in Article 2 are:

(1) any act of aggression, including the use of armed force other than in self-defense or under UN authority;

(2) any threat of aggression;

(3) preparations for the use of armed force, other than in self-defense or under UN authority;

(4) incursion into a State by armed bands acting for a political purpose;

(5) encouragement or toleration of activities designed to foment civil strife in another State;

(6) encouragement or toleration of activities calculated to carry out terrorist acts in another State;

(7) acts in violation of treaty obligations limiting armaments, military training, etc.;

(8) annexation, contrary to international law, of territory of another State or under an international regime;

(9) genocide, as defined in the Genocide Convention;

(10) crimes against humanity committed in connection with other offences herein listed;

(11) acts in violation of the laws and customs of war;

(12) acts constituting conspiracy, attempts, or direct incitement to commit any of the preceding, and acts constituting complicity in the commission thereof.

The extreme generality of much of the language used in the draft code is evident even from the short summary above. The difficulties of reducing the subject matter to precise terms became especially clear during the Commission's prolonged effort to frame a satisfactory definition of "aggression". Despite numerous drafts by various members, the Commission found it impossible to agree on a definition either in abstract terms or by means of enumeration of acts constituting aggression. The maximum agreement achieved, reflected in Article 2 (1) of the draft code, was that an act of aggression undoubtedly included the use of armed force against another state other than in self-defense or under UN authority. In view of this and other deficiencies which would make easy the abuse of the code, the draft in its present form hardly seems suitable for adoption as a binding international obligation.

The Covenant on Human Rights

(Continued from page 820)

must be an independent judiciary available to protect these rights against their natural attackers, those wielding executive and legislative powers, because it was, again according to John Locke, the absence of an "indifferent judge" in the state of nature that prompted men to get out of it.[119]

Under the Draft Covenant on Human Rights the situation is fundamentally different. Europeans, who wrote their political conceptions in the Covenant, although sometimes paying lip service to the idea of natural rights, actually act upon the proposition that the rights are *granted by the state rather than by nature*. It follows that, if the state gives, the state can determine the conditions of its grant, can revoke it, can suspend it (!), can subject it to limitations (!), can dispense with a judiciary adjudicating claims based upon the rights.

The whole question has a deeply emotional, even spiritual significance. That men do not live by bread alone is especially true in this country, Marxist professions to the contrary notwithstanding. Whatever political or economic differences may exist in America, the great majority of the people are united in the belief in the sanctity of the Bill of Rights and the philosophy of inherent natural rights underlying it. "We hold these truths to be self-evident...", is part and parcel of the intellectual, moral and spiritual make-up of every good American. It is the Declaration of Independence and the American Constitution, not the Universal Declaration of Human Rights or the Covenant based upon it, that inspire the people in a manner unequalled by any other political code. For these ideals Americans are willing to make sacrifices, to fight, to die. If the Covenant on Human Rights should ever be put on our statute books, we should be binding ourselves to other states in a treaty to uphold and enforce foreign ideological concepts diametrically opposed to our own, and the sacred character of the Bill of Rights would suffer.

(4.) The civil and political rights of the Draft Covenant are to be implemented by a Human Rights Committee consisting of nine members[120] who are elected by the International Court of Justice[121] from a list of persons nominated[122] by the states parties to the Covenant. The Committee is to draw up a report which will be sent to the states concerned and then communicated to the Secretary General of the United Nations for publication.[123]

A special arrangement has been made for "serious cases where human life is endangered".[124] Here the Committee may, at the request of a state "deal forthwith" with the case, that is to say, the usual interim period during which adjustment of the matter ought to be attempted, will not be observed.[125] In what manner the Committee may deal with such a case is not clear. A subsequent provision,[126] to be sure, instructs the Commission to complete its report "as promptly as possible". Whether this is the appropriate ultimate remedy in a case of the urgency envisaged by the framers is not clear. In a recent article[127] the present chairman of the Human Rights Commission, Dr. Charles Malik, writes that the Committee is "entitled to act forthwith". What action is to be taken, he does not say.[128]

The case of the Greek rebels and intervention on their behalf should be remembered. Besides, when is human life endangered? *Media in vita in morte sumus.* The intention behind the provision may have been good, the draftsmanship applied for the purpose of carrying the provision out, proved, as so often, inadequate.

Whereas the states agree not to submit a dispute within the competence of the Committee[129] to the International Court of Justice, the latter on its part may recommend that the Economic and Social Council request the Court to give an advisory opinion on any legal question connected with a matter of which the Committee is seized.[130] The wisdom of this special arrangement is to be questioned.

Generally speaking, the institution of the Human Rights Committee as such and the implementation procedure to be administered by the Committee are open to serious question. Convincing arguments to this effect were advanced by the Indian delegation.

Why Should We Worry About Draft Covenant?

The question arises whether it really makes sense, from the American point of view, to be concerned about the incompatibility of the Human Rights Covenant with the Constitution of the United States. It may be argued that, even should the Covenant become the law of the land, the Constitution would still stand so that this government would still be under the constitutional obligation, for example, to refrain from restricting freedom of expression and suspending civil liberties. Is it not conceivable, however, that at some future date some of the contracting states which were parties to the Covenant may request the United States to make use of the authorizations to limit freedom of expression or suspend other liberties on the ground that in the opinion of the parties to the Covenant these restrictive policies are required for the attainment of certain common objectives? While failure to respond to the request would not be the breach of an international obligation since the right to impose restrictions need not be exercised, still suppose that our Govern-

119. See editorial: "The Bulwark of Freedom—An Independent Judiciary", 37 *A.B.A.J.* 518, July, 1951.
120. Draft Covenant on Human Rights, Art. 33.
121. Draft Covenant on Human Rights, Art. 37.
122. *Ibid.* Art. 34.
123. *Ibid.* Art. 57.
124. *Ibid.* Art. 52, § III.
125. *Ibid.* Art. 52, §§ II and III.
126. Art. 57, § II, Cl. 2.
127. Charles Malik, "Defining Human Rights Legally Is Major Task", *United Nations Reporter*, July, 1951, page 3.
128. Possibly he was suggesting a theory of implied powers such as expounded by John Marshall in *McCulloch v. Maryland*, 4 Wheat. 316 (1819).
129. Draft Covenant on Human Rights, Art. 59.
130. *Ibid.*, Art. 56.

a restrictive congressional act or an executive emergency declaration suspending, *e.g.*, freedom of speech and press. In such a situation recourse will be open to the United States Supreme Court. Can it be taken for granted, however, that in such a case the Court will actually function as the guardian of the Constitution? Will the Court declare the statute or executive order unconstitutional, though authorized by the Covenant as the supreme law of the land? To assume such action on the part of the Court would suppose that this tribunal would commit one of the greatest reversals in its history. For the very first time it would *invalidate* a treaty made under the authority of the United States.[131] But would it?

In the migratory birds case[132] the Court itself, bluntly and unequivocally, answered the question in the negative. The case involved the constitutionality of a treaty between the United States and Great Britain and an Act of Congress carrying out the treaty. Both documents provided for specified closed seasons and protection in other forms for migratory birds. The State of Missouri contended that both the treaty and the statute unconstitutionally interfered with rights reserved to the states by the Tenth Amendment and that the Federal Government had invaded the sovereign rights of the state. Missouri also alleged a pecuniary interest as owner of the birds within its borders. "No doubt", said the Court, "the great body of private relations usually falls within the control of the state, but a treaty may override its power. . . . It is not lightly to be assumed that, in matters requiring national action, a power which must belong to and somewhere reside in every civilized government is not to be found. . . . Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power." May not the Court apply exactly the same reasoning in a case in which the constitutionality of the Covenant is challenged? Is not the promotion of human rights on a global scale "a national interest of very nearly the first magnitude" which "can be protected only by national action in concert with that of another power"? If the Court considered the regulation of migratory birds as vital, how much more importance might the Court be willing to attach to the direct promotion of human rights! The Committee on Civil Rights, appointed by the President, was rather confident that the Court could be used for the purposes of the reformers when it made the following "sinister and cynical"[133] suggestion:

> In its decision in *Missouri* v. *Holland* in 1920, the Supreme Court rules that Congress may enact statutes to carry out treaty obligations, even where, in the absence of a treaty, it has no other power to pass such a statute. This doctrine has an obvious importance as a possible basis for civil rights legislation.[134]

Since nobody can predict what the Court will do in so novel a situation where Congress or the President exercise restrictive powers under the Covenant, it is clear that the Draft Covenant in its present form constitutes a danger to the American concept of human rights.[135]

National Interest Requires Rejection of Covenant

In the light of the premises, let us re-examine the underlying philosophy of an International Bill of Rights, especially from the point of view of the national interest of the United States.

In the domestic field, apart from what has already been said, it ought to be remembered that the American Revolution established the independence of this nation. The Fathers instituted a new government of the people, "laying its foundation on such principles, and organizing its powers in such form, as to *them*[136] shall seem most likely to effect *their*[137] safety and happiness".[138] The Fathers also wrote the Constitution, among other things, "to secure the blessings of liberty to *ourselves*[139] and *our*[140] posterity".[141] Were the Fathers ignorant, short-sighted, and egotistic, interested only in the affairs of their own clan, blind to the fortunes or misfortunes of other peoples? By no means! What they perfectly understood was that one had to see things in their proper perspective. To them it was clear, as it ought to be to us, that government is more than the sum total of the political organs of the state. The Fathers realized, in the words of a modern writer,[142] that "an essential characteristic of a nation's form of government is the relation of the individual to the government. In some nations, the individual accepts the denial of his liberty by government in exchange for what he considers to be a fair return from the government. In some, the principle of state collectivism is present. In others, the individual is king and the government is subject. Uniformity of relations between government and the individual can never be achieved in reality. The very essence of sovereignty is the right of a nation to decide its form of government, which means its own conceptions of the rights of citizens."

The very moment the Covenant is put in force, the Declaration of Independence will be legislated out of existence. This proposition will

131. See *U. S. v. Reid*, 73 F. (2d) 153, 155 (C. A. 9) that the power to hold a treaty unconstitutional is doubtful. *New Orleans v. U. S.*, 10 Pet. 662, is sometimes referred to as having invalidated a treaty, but the case is explainable on other grounds, and in some of its reasoning conflicts with *Missouri v. Holland*, for which see note 132.

132. *Missouri v. Holland*, 252 U. S. 416 (1920).

133. Carl B. Rix, "Human Rights and International Law: Effect of the Covenant Under Our Constitution", 35 *A.B.A.J.* 618, July, 1949.

134. Quoted by Carl B. Rix, *op. cit.*

135. The writer has not overlooked Article 18 (2), seemingly intended to prevent the Covenant from being interpreted as reducing greater rights and freedoms which are already guaranteed by the existing laws of any country. The probable inefficacy of this article is shown in Report of Committee on Peace and Law, September 1, 1950, page 82.

136. Italics are the author's.

137. Same.

138. Declaration of Independence.

139. Italics are the author's.

140. Same.

141. Preamble of the Constitution of the United States.

142. Editorial by Raymond Moley in the *Chicago Journal of Commerce*, June 7, 1950 (quoted in the Report of the Committee for Peace and Law Through United Nations, September 1, 1950, page 29).

be found outrageous by the defenders of the Covenant, but it is true. Under the Declaration of Independence and the Constitution the government-individual relationship is determined independently by the people of the United States to advance their own safety and happiness by such governmental organization and adherence to such political principles as "to them" seems effective. Under the Draft Covenant the same relationship is largely governed by the principle of advancing the safety and happiness of the peoples of the globe as seems proper to the Human Rights Committee, the Economic and Social Council, and the General Assembly. The war of 1776 will have been fought in vain, the principles of the Revolution undone, self-government abolished, with the international bureaucracy as the new sovereign in the field of human rights taking the place of George III. Ridiculous? Maybe, but true!

If in the field of foreign affairs the preservation of an *honorable* peace is one of the objectives of American policy, it ought to be noted that the lack of a Human Rights Covenant has not heretofore caused a war.[143]

We are informed that 1200 times a Draft Declaration of Human Rights had to be put to a vote before the draft could be submitted to the General Assembly.[144] This should hardly be surprising in view of "the variety of national backgrounds, philosophies, legal systems, and social practices that made up the United Nations, and which produced official attitudes so diverse that some delegates frankly questioned whether it was profitable to seek a common denominator in the form of a binding international convention."[145] It is more than surprising, however, that the American delegation did not vote against the Declaration or the Draft Covenant, for that matter, both documents containing so many questionable provisions.

U. S. Is Not Satisfied with Rights Declaration

Even leading United Nations personalities, who cannot possibly be accused of hostility towards the organization, had to admit their disappointment at the results of efforts to write an International Bill of Rights. In stating the general position of the United States on the Universal Declaration of Human Rights, Mrs. Roosevelt "made it clear that this Government did not regard the text submitted by the Commission on Human Rights as perfect and, in fact, was not fully satisfied with certain provisions in the document".[146] Why, then, may one ask, was the document signed at all? No one forced the United States to sign!

As far as the Draft Covenant is concerned, the current President of the Human Rights Commission, Dr. Charles Malik, of Lebanon, at the conclusion of the April-May, 1951, session, called it a text "with a certain lack of balance".[147] Various delegations voiced dissatisfaction. The Indian delegation, commenting on implementation of political rights, called the Covenant, and quite rightly so, "dangerous to world peace".[148] The British delegation which represented a Labor Government and, therefore, could have been expected to endorse the economic and social provisions of the Covenant wholeheartedly, registered strong opposition.[149] This uncompromising position should be compared with the temporizing attitude of the United States delegation[150] which proved to be more socialistic than its colleagues from Great Britain. Mrs. Roosevelt, personally commenting on the Draft Covenant, conceded that she was only "moderately pleased" with the Commission's work.[151] In her syndicated column for August 28, 1951, she referred to the Draft Covenant as "unfinished".

The result of American efforts to promote freedom and justice throughout the world by means of participating with the community of

143. Frank E. Holman, "An 'International Bill of Rights': Proposals Have Dangerous Implications for U. S.", 34 A.B.A.J. 985, November, 1948. See also additional article by Mr. Holman referred to in note 37.

144. The Brookings Institution, *Major Problems of United States Foreign Policy 1950-1951*, page 160, note 6.

145. Richard P. Stebbins, *The United States in World Affairs* 1950. (New York, 1951) 392.

146. Department of State Publication 3437, page 130.

147. *The New York Times*, May 20, 1951.

148. "The Committee set up under the draft can only function when a state is a complainant and the other state is accused. An individual or group of individuals, whose rights have been transgressed may interest a state which will, in practice, be a state not well disposed towards the accused state and thus foment a controversy between two states. In the ultimate analysis, therefore, the Covenant and the machinery set up for its implementation may turn out to be dangerous to world peace."—Report of the Seventh Session of the Commission on Human Rights, United Nations Economic and Social Council, General E/1992 E/CN. 4/640, May 24, 1951, page 87.

149. "His Majesty's Government remain of the position that the definition of economic, social and cultural rights and the permissible limitations thereto in terms sufficiently precise to give rise to binding legal obligations and which at the same time take into account the differences in the economic, social and cultural development of states and of their structure is a task which may not yet be possible. His Majesty's Government considers that the draft articles elaborated by the Seventh Session of the Human Rights Commission demonstrate the difficulties of this task without showing how they are to be overcome. His Majesty's Government, therefore, remains of the opinion that it is undesirable to attempt to incorporate them in this Covenant."—Report of the Seventh Session of the Commission on Human Rights, United Nations Economic and Social Council, General E/1992 E/CN. 4/640, May 24, 1951, page 88.

150. "The United States wishes to call attention to the express reservation it made in the Commission on Human Rights on 19 May 1951 with respect to the provisions on economic, social and cultural rights drafted in this session of the Commission. The United States feels that there should be a careful reconsideration of these provisions. This is not, however, to be interpreted as indicating any lessening of the interest or efforts of the United States for the achievement of economic, social and cultural rights through the United Nations or through the various specialized agencies in this field. The United States participated in the work of this session of the Commission on Human Rights in attempting to carry out the mandate of the General Assembly to draft economic, social and cultural rights with a view to their inclusion in the Covenant. The United States did so, despite its initial view that such rights should not be included in the same Covenant with civil and political rights. Our experience in the present session of the Commission on Human Rights has been such that we are now of the view that the provisions in the Part of the Covenant dealing with economic, social and cultural rights—being loosely drafted and not being expressed in terms of legal rights and with different implementation and undertaking—should be dealt with in a separate legal instrument."—Report of the Seventh Session of the Commission on Human Rights, Economic and Social Council, etc., page 89.—The views expressed in this statement seem fantastic in the light of some of the United States of America's contributions to the Draft. Our representatives seemed very willing and were held back only by regard for opinion from the home front.

151. *The New York Times*, May 20, 1951.

nations in writing the Covenant has been, and quite necessarily so, a failure. "What justice means in the United States can within wide limits be objectively ascertained; for interests and convictions, experiences of life and institutionalized traditions have in large measure created a consensus concerning what justice means under the conditions of American society. No such consensus exists in the relations between nations. For above the national societies there exists no international society so integrated as to be able to define for them the concrete meaning of justice or equality, as national societies do for their individual members."[152]

As has been shown on the preceding pages, the nations of the world, far from accepting American ideas on liberty, have succeeded in inducing the American delegation to accept their views. In other words, the efforts of the United States to bestow the blessings of liberty on the world as a whole have boomeranged. The crusading missionary[153] returning home from abroad finds himself converted to the creed of the nonbelievers to whom he was supposed to teach the gospel! What a spectacle, ludicrous and tragic at once!

At one time during the deliberations about a Draft Covenant the American delegation saw the light. They clearly recognized the bad deal which the United States would get in the event of the ratification of the Covenant. It is against this background that Article 18 (2) should be read, proposed as an additional article by the United States:[154] "Nothing in this Covenant may be interpreted as limiting or derogating from any of the rights and freedoms which may be guaranteed under the laws of any contracting states. . .".[155] The United States delegation apparently reasoned that with the insertion of this clause the paramountcy of the Constitution over and above the Covenant would be assured. This, of course, is a dangerous illusion. It is a well-known general rule that the Constitution means what the Court says it means. It stands to reason that the question whether or not provisions of the Covenant limit the Constitution will also be ultimately decided by the Court. Furthermore, it is sheer illusion to believe that the provisions of the Covenant will always yield to easy judgment as to whether they do or do not "limit" the Constitution.[156] In other words, the relations between the two documents cannot always be measured in arithmetical terms of minuses or pluses. Two political and economic systems are put in juxtaposition. It will often be impossible to state that one of them grants less or more than the other since both are motivated by the desire to offer social values, not of the same kind, but of a *different nature!*

It is this essential point which Professor Zechariah Chafee[157] fails to recognize, especially when he argues[158] that "the Covenant is like a treaty providing for a 45-hour week. This is obviously violated by a country which tolerates a 50-hour week in its factories. . .". Actually, conditions will often be found to be much more complex than the situation described by Professor Chafee. Article 18, Section 2, even if it were clear,[159] therefore, does not at all vitiate "a large portion of the arguments against the Covenant", as Professor Chafee wants us to believe.[160] If the Covenant is put on the statute books, the Supreme Court will be given the opportunity to decide many questions. The Court may consider the treaty as being "of equal dignity with our Bill of Rights".[161] Thus, the American system is clearly put in jeopardy. If one is disturbed over taking such a risk with the Court, as one certainly should be, nonratification of the Draft Covenant is the only sound solution. Professor Chafee expects us to put our trust in the Supreme Court because it will not look at the Constitution in a "picayune and pernickety" way[162]—because the Court will protect the Constitution. But why should one rely on a protector? Why should one bring about an inflammatory situation and count on the fireman putting out the fire when with caution one can prevent the emergence of the inflammatory situation in the first place?

For a final appraisal of this document one may be permitted for a minute to apply the reasoning of the proverbial hard-boiled businessman who very definitely would ask the question: "What is in it for us?" In considering all that has been said before, the answer, "Nothing", would be a gross understatement. The correct answer would have to be: All the evils mentioned previously, encroachment upon self-government, plus the possible whittling away of those liberties which are so dear to the great majority of Americans.

Even from the point of view of the other countries the value of the Covenant is doubtful. That the implementation of the economic, social and cultural rights will lead to deterioration in international relations, has already been shown. Neither does this writer see any advantages for the other participating states, as far as the political rights of the Covenant are concerned. Does it really make sense, from the standpoint of

152. Hans J. Morgenthau, *In the Defense of the National Interest* (Alfred A. Knopf, 1951) 34.

153. The existence of a missionary spirit was observed by Frank E. Holman when he said in his article "An 'International Bill of Rights': Proposals Have Dangerous Implications for U. S." 34 *A.B.A.J.* 985, November, 1948: "Therefore, in my opinion we are not dealing with a so-called International Bill of Rights that will assuredly contribute to world peace. We are dealing chiefly with a Missionary spirit on the part of social and economic reformers to establish throughout the world their social and economic ideas. . ." See also note 37.

154. Louis B. Sohn, *op. cit.*, page 563; see also note 135.

155. Draft Covenant, Art. 18, § II.

156. See American Bar Association, Report of the Special Committee on Peace and Law Through United Nations, September 1, 1949, page 8.

157. Zechariah Chafee, "Federal and State Powers under the Covenant on Human Rights", 1951 *Wis. L. Rev.* 389 (May, 1951).

158. See note 157, *Ibid.*, page 455.

159. See note 135.

160. *Ibid.*, page 391, note 3. — Incidentally, is Professor Chafee's statement about the vitiation of large portions of the arguments against the Covenant to be taken as an admission that some portions of the arguments are still valid?

161. Report of the Special Committee on Peace and Law Through United Nations, September 1, 1949, page 7.

162. *Op. cit.*, page 452.

these states, to conclude a treaty that authorizes them to limit freedom of expression and suspend liberties? All this the states can do anyway, without any treaty any time. It may not be an exaggeration to say that the Covenant is a treaty which gives the other states nothing while possibly depriving us of everything.

According to Professor Chafee[163] the Covenant's "main purpose is to gain more freedom in countries which have too little now, and hold the line in countries which might be tempted to increase suppression. It would be very pleasant indeed if it were immediately possible to bring every conceivable signatory nation up to the high level of fundamental human rights which fortunately has long prevailed in our land. Yet that is obviously impossible." In other words, we are told that at this stage we can only hope for a world system of second grade rights, not as good as our own, but that our own rights are not intended to suffer in consequence of Article 18; and the rest of the nations of the world will have a system of rights as good as, or better than, they have had heretofore. To all of this, the obvious answer is that the United States of America ought not to be a party to foisting a second-rate system of so-called rights upon the rest of the world—rights many of which, after being solemnly declared as such, are expressly subject to being impaired by "law"[164] for ordinary police power purposes and also expressly subject to being impaired by emergency declarations officially proclaimed by the authorities.

It is a hopeful sign that for these very same reasons the United States recently denounced and rejected a proposed United Nations treaty on freedom of information. The treaty would permit suppression of news and prosecution of news media for publishing materials "likely to injure feelings" of other nations or religious or racial groups, "false or distorted reports which undermine friendly relations between peoples or states" and other such broad categories of news that governments never like to have published (*The New York Times*, August 15, 1951). "We have reached the conclusion", Walter Kotschnig, United States delegate, said in the Social Committee of the United Nations Economic and Social Council on August 14, 1951, "that the present unsettled times which reflect the deep-seated confusion of ideas and principles is not propitious for attempting such a work"...."My Government would not become a party to any such convention *because we do not want to see any peoples subject to such limitations.*" (*Ibid.*; italics are the author's).

But our government still supports Article 14 of the Covenant on Human Rights relating to freedom of speech and press, although it does not differ in principle from the Draft Covenant on Freedom of Information.[165]

In the last analysis, as has already been indicated, ratification of the Covenant would amount to introducing world government through a back door. In their efforts to establish world government in the orthodox manner, by calling a constitutional convention which would then set up the political organs of the world state, the proponents have, at least temporarily, been defeated. Far from being discouraged, however, they resorted to unorthodox methods by which they could, rather unobtrusively, attain the same objective. If a world legislature could not be had at present, this was really no cause for despair. What mattered, after all, was not so much the legislature but legislation. If the latter could be achieved without the former, everything would go according to plan. The substitute device decided upon was, of course, the conclusion of a world-wide international treaty, the Covenant on Human Rights.

Since the Covenant and world government are of the same stuff, it is not just a coincidence that the most characteristic evil of the latter also manifests itself in the former: the imposition[166] of a uniform code upon the globe as a whole with no consideration for the individuality of each country or its special cultural, economic and political system. It is not the proper function of the United Nations to destroy these diversities of nations which, at least in many instances, are just as valuable as the "diversities of natures among us" (Plato).

The fact appears to be that our governmental representatives have gone overboard in the matter of tyring to cure the ills of the universe by pleasant words, which shall be universally acceptable, and will therefore be wholly ineffective. It is refreshing indeed that a career man

163. Op. cit., page 464. See Committee on Peace and Law, September 1, 1951, pages 21-23, answering much of Professor Chafee's reasoning.

164. As far as the "law" referred to is concerned, it is often not the embodiment of wisdom based on the experience of society and arrived at after due deliberation. In the United States a valid "law", whatever its source, is one that passes the test of the Constitution in the judgment of an independent court; but "law" in many countries is nothing but an arbitrary executive decree or legislative fiat, wholly immune from challenge by anyone. While the Covenant drafters have agreed on the word "law", the different concepts as to its meaning render a uniform standard of application impossible. See Committee on Peace and Law, September 1, 1951, page 23.

165. See Committee on Peace and Law, September 1, 1951, pages 25-27. That report says (page 26): "There is no fundamental difference between the Draft Covenant on Freedom of Information and Article 14 of the Draft Covenant on Human Rights. Both permit intolerable restrictions. The first one boldly spells them out in detail; the second one permits them in general language, leaving it to each nation to spell them out in similar detail. It seems obvious that the views of nations supporting the detailed restrictions in the first will be applied by them under the general language of the second; and that in thought and in practice the nations will be just as far apart under Article 14 as they are now. Not only is nothing to be gained by Article 14, the future interpretation of which by a large group of nations is so clearly heralded by the detailed restrictions in the Draft Convention on Freedom of Information, but much is to be lost, because if we should ever ratify Article 14, we would have become a party to, and sanctioned, the very thing in general language that we are opposing in detail. Indeed, it seems providential that the issue of freedom of speech and press has been so clearly made in the Draft Convention on Freedom of Information because we shall now know what to expect under Article 14 if it becomes effective. We have set out the Draft Convention in Appendix C, so that the reader may see for himself."

166. "No basic standard or system of human rights can be successfully imposed upon any nation by any other nation or group of nations or by any other outside source. Where such standards exist in the world today, they have developed as a natural expression of the overwhelming weight of opinion of the local population," Frank E. Holman, "An 'International Bill of Rights': Proposals Have Dangerous Implications for U. S.", 34 A.B.A.J. 985, November, 1948.

in our State Department, George F. Kennan, with twenty-five years' experience in the foreign service, and at the moment on leave, has currently pointed out that we are in this respect going up a blind alley. As summarized by an able reviewer[167] Mr. Kennan says in substance:

> Instead of dealing with the hard realities of the conflicts of interest between powers in a mature and pragmatic way, we have sought to get the nations to subscribe to high-minded codes of principles which inevitably broke down when they ran counter to the selfish interests of a major power. Instead of basing our policy on a careful appraisal of the power factors in the world, and trying to adjust those power factors through diplomacy so as to preserve the maximum degree of stability, we have exaggerated the role of moral and legal principles, confused our own people, our allies and our enemies in the process.

As all these points suggest, Kennan believes we have taken on too much. He wants us to be more modest in our concepts; to abandon such slogans as "total victory" and "unconditional surrender"; to be a little less confident that declarations or legal codes, or world leagues or high-minded charters will dispel the hard facts of international rivalries . . . .

At the time of this writing (October 1, 1951), the war in Korea is still going on. The United States delegation has, unfortunately, not realized that the struggle against communism is a global one, indeed. It is waged not only on the battlefields of Korea, but everywhere, including the Council chambers of the United Nations and the Human Rights Commission. American boys in Korea bearing the brunt of the communist onslaught are fighting for the same ideas and ideals that ought to be upheld at the conference table. Our troops gave a magnificent account of themselves, but our delegates or those who instruct them lacked both courage and faith to refuse to sign a document[168] so utterly alien to the American tradition. As a consequence, American prestige is bound to suffer since the world will not think very highly of America's determination to fight for her freedom or her ideals, if she, without hesitation, joins in a pact with other nations, a document in which she subscribes to a political philosophy supposedly an anathema to her. "What leadership can exist after an abject surrender of principles?"[169] It is not proposed here that the world copy the American Constitution or that we never compromise. But it is proposed that a compromise on our part on fundamentals should be out of the question. Our sacrifice of fundamental principles[170] would be a victory for the Kremlin, far greater than it has won up to the present time.

The Draft Covenant, then, because of its dangers to America, should emphatically be rejected. Rejection should not have to wait for the Senate's refusal to ratify the Covenant. It would be a much more honest position for the United States to state the reasons now why she cannot sign the document. Public opinion must be organized at once to inform the Administration about the views of the people on this question. The Administration in turn should instruct the delegation to the United Nations not to sign the Draft Covenant in its present form.

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167. James Reston in the *New York Times Book Review*, September 30, 1951, page 33, reviewing *American Diplomacy, 1900-1950*, by George F. Kennan, University of Chicago Press.

168. The Declaration of Human Rights.

169. American Bar Association, Report of the Committee for Peace and Law Through United Nations, September 1, 1950, page 38.

170. Mr. Arthur Hays Sulzberger, publisher of *The New York Times*, seems to advocate such a compromise on the ground that he is "afraid of the propaganda effect if we refuse to sign" . . . ."Our action will be misinterpreted and misunderstood." (*The New York Times*, August 22, 1951). This is a kind of internationalism that should be firmly opposed.

New York University Law Center
(Continued from page 831)

sented by Dr. C. W. de Kiewiet, President of the University of Rochester. While Dr. de Kiewiet is noted as a historian, he has also served as dean of a liberal arts college. Dr. de Kiewiet's paper was discussed from three points of view: from that of the politician by J. William Fulbright, United States Senator from Arkansas; from that of the trial lawyer, prosecutor and judge, by William A. Wachenfeld, Justice of the Supreme Court of New Jersey; and from that of the city official and the expert on local government by Murray Seasongood, of the Ohio Bar.

The most important topic, "Leadership and the Law", was introduced by Chester I. Barnard, President of the Rockefeller Foundation. The discussion was continued by Governor Alfred E. Driscoll of New Jersey and Carrol M. Shanks, President of The Prudential Insurance Company of America.

The general theme of the dinner meeting was "The Law Center and the Legal Profession". Dean Pound, in his address on "Law Education in a Unifying World", set objectives for a law center favorably located for the task of undertaking projects in international law and comparative law to the end that there might be a world legal system by the time that there is a unified political system. Chief Justice Vanderbilt spoke on the topic of "The Mission of a Law Center", summarizing what we have so far been able to accomplish and what we plan for the future. The final address, in the most felicitous British tradition, was given by Sir Francis Raymond Evershed on the topic, "Our Common Heritage of Law". These addresses will also appear in the published proceedings.

At the conclusion of the dinner program the University conferred honorary degrees on all speakers at the dedication ceremonies.

At the dinner meeting, Judge Vanderbilt announced a grant of $1,000,000 from the Charles Hayden Foundation for a residence hall to complete the physical facilities of the Law Center. The new residence hall will be designed for mature, professional students, with the emphasis on privacy and convenience. The Law Center will continue to have the active interest of Judge Vanderbilt, who remains as President of Law Center Foundation. We are heartened by the cordial interest of our many friends who attended the dedication.

Advocacy Before the Supreme Court

(Continued from page 804)

pensable to success, and practice varies widely. Few lawyers are gifted with memory and composure to argue a case without papers of any kind before them. It is not necessary to try. The memorized oration, or anything stilted and inflexible, is not appropriate. Equally objectionable is the opposite extreme—an unorganized, rambling discourse, relying on the inspiration of the moment. If one's oral argument is simply reading his printed brief aloud, he could as well stay at home. Almost as unsatisfying is any argument that has been written out and is read off to us, page after page. We like to meet the eye of the advocate, and sometimes when one starts reading his argument from a manuscript he will be interrupted to wean him from his essay; but it does not often succeed. If you have confidence to address the Court only by reading to it, you really should not argue there.

The first step in preparation for all exigencies of argument is to become filled with your case—to know every detail of the evidence and findings, to weigh fairly every contention of your adversary, and to review not only the rule of law applicable to the specific issue but the body of law in its general field. You never know when some collateral or tangential issue will suddenly come up.

My practice was to prepare notes, consisting of headings and catchwords rather than of details, to guide the order of argument and prevent important items from being overlooked. Such notes help to get back on the track if one is thrown off by interruptions. They will tend to limit rambling and irrelevance, give you some measure of confidence, and at the same time let you frequently meet your judges eye to eye.

Do not think it beneath you to rehearse for an argument. Not even Caruso, at the height of his artistic career, felt above rehearsing for a hundredth performance, although he and the whole cast were guided and confined by a libretto and a score. Of course, I do not suggest that you should declaim and gesture before a mirror. But, if you have an associate, try out different approaches and thrash out every point with him. Answer the questions that occur to another mind. See what sequence of facts is most effective. Accustom yourself to your materials in different arrangements. Argue the case to yourself, your client, your secretary, your friend, and your wife if she is patient. Use every available anvil on which to hammer out your argument.

If one is not familiar with the Court and its ways, it may be helpful to arrive a day or two early to observe its procedure, to see how the Court deals with counsel and how counsel gets on with the Court.

When the day arrives, shut out every influence that might distract your mind. An interview with an emotional client in difficulty may be upsetting. Friends who bear bad news may unintentionally disturb your poise. Hear nothing but your case, see nothing but your case, talk nothing but your case. If making an argument is not a great day in your life, don't make it; and if it is, give it everything in you.

By all means leave at home the associate who feels constantly impelled to tug at your coattails, to push briefs in front of you, or to pass up unasked-for suggestions while you are speaking. These well-meant but ill-conceived offerings distract the attention of the Court, but they are even more embarrassing and confusing to counsel. The offender is an unmitigated pest, and even if he is the attorney who employed you, suppress him.

I doubt whether it is wise to have clients or parties in interest attend the argument if it can be avoided. Clients unfortunately desire, and their presence is apt to encourage, qualities in an argument that are least admired by judges. When I hear counsel launch into personal attacks on the opposition or praise of a client, I instinctively look about to see if I can identify the client in the room—and often succeed. Some counsel have become conspicuous for the gallery that listens to their argument and, when it is finished, ostentatiously departs. The case that is argued to please a client, impress a following in the audience, or attract notice from the press, will not often make a favorable impression on the Bench. An argument is not a spectacle.

You should be warned that, in acoustical properties, the Supreme Court chamber is wretched. If your voice is low, it burdens the hearing, and parts of what you say may be missed. On the other hand, no judge likes to be shouted at as if he were an ox. I know of nothing you can do except to bear the difficulty in mind, watch the bench, and adapt your delivery to avoid causing apparent strain.

The time allotted to you will be one hour ordinarily, and half of that if the case is on summary docket. Time is sometimes, though rarely, extended in advance if the case appears to require it, but seldom do we find extended time of much help to the Court. In any event, do not waste time complaining that you do not have enough time. That is a confession of your own inadequacy to handle the case as the Court's experience indicates it should be. Keep account of your own time or, if you cannot, have an assistant do so. Some lawyers ask, and some even ask several times, how much time they have left and wait for it to be calculated. Why will a lawyer interrupt his effort to hold the attention of a Court to his argument in order to divert its mind to the clock? Successful advocacy will keep the Justices' minds on the case, and off the clock.

This, above all, remember: Time has been bestowed upon you, not imposed upon you. It will show confidence in yourself and in your case, and good management of your argument, if you finish before the signal stops you. On the other hand, if the warning that your time has expired

catches you in the middle of an argument, the chances are that you have not made good economy of your time.

Agility and Diplomacy of Counsel Tested by Questions from Bench

The Supreme Court, more than most tribunals, is given to questioning counsel. Since all of the Justices gave the case preliminary consideration when certiorari was granted or jurisdiction was noted, tentative opinions or inquiries are apt to linger in their minds.

Questions usually seek to elicit information or to aid in advancing or clarifying the argument. A question argumentative in form should not be attributed to hostility, for oftentimes it is put, not to overbear counsel, but to help him sharpen his position. Now and then, of course, counsel may be caught in a cross-fire of questions between differing Justices, each endeavoring to bring out some point favorable to his own view of the law. That tests the agility and diplomacy of counsel.

Some lawyers feel an ill-concealed resentment at questions from the bench. It is not hard to see that if they had the wit they would have the will to respond as did a British barrister in an incident related to me by Arthur Goodhart, K.B.E., K.C.: The judge said, "I have been listening to you now for four hours and I am bound to say I am none the wiser." The barrister replied: "Oh, I know that, my Lord, but I had hoped you would be better informed."

A Justice may abruptly indicate conclusions which tempt a lawyer to reply as one did long ago in a local court in the country where I practiced. He had barely stated his contention when the judge said: "There is nothing to your proposition—just nothing to it." The lawyer drew himself up and said: "Your Honor, I have worked on this case for six weeks and you have not heard of it twenty minutes. Now, Judge, you are a lot smarter man than I am, but there is not that much difference between us."

But I always feel that there should be some comfort derived from any question from the bench. It is clear proof that the inquiring Justice is not asleep. If the question is relevant, it denotes he is grappling with your contention, even though he has not grasped it. It gives you opportunity to inflate his ego by letting him think he has discovered an idea for himself.

When I was at the bar, it seemed to me that I could make no better use of my time than to answer any doubt which a judge would do me the favor to disclose. Experience in the Court teaches that a lawyer's best points are sometimes made by answers to pertinent and penetrating questions. A lively dialogue may be a swifter and surer vehicle to truth than a dismal monologue. The wise advocate will eagerly embrace the opportunity to put at rest any misconception or doubt which, if the judge waited to raise it in the conference room, counsel would have no chance and perhaps no one present would have the information to answer.

Some lawyers complain that questioning is overdone; and sometimes colloquy between Court and counsel is undoubtedly carried too far. If cases were uniformly well presented, perhaps the best results would be obtained if few questions were asked. Generally, an argument that from its very outset shows that it will be well-organized and thorough tends to ward off questions. At all events, nothing tests the skill of an advocate or endangers his position more than his answer to questions, and in nothing is experience, poise, and a disciplined mind a greater asset.

I advise you never to postpone answer to a question, for that always gives an impression of evasion. It is better immediately to answer the question, even though you do so in short form and suggest that you expect to amplify and support your answer later.

Counsel should be prepared to deal with any relevant question, but, if he is not, he ventures less by a frank admission that he does not know the answer than by a guess. Counsel need not fear that he will be prejudiced by declining to be drawn into a discussion of some proposition that is irrelevant to his case. To refuse might seem like a rebuff to the inquirer, but it may delight eight colleagues.

Many Counsel Adhere to Custom of Formal Morning Attire

It may seem a trivial matter, but I am told that one of the questions most frequently addressed to the Clerk's Office concerns the apparel in which counsel must, or should, appear. Formal dress is traditional and I understand once was required.

Some amusing stories of those days linger among Court attachés. It is said that Chief Justice Taft once refused admission to the Bar to a candidate who appeared without necktie or waistcoat, with the suggestion that he renew his application when properly attired. The Marshal's Office kept in active service, and still keeps in moth balls, one or two cutaway coats to lend to counsel in need. Apparently he was expected to be equipped with his own trousers.

Those days have passed away, but the tradition remains that appearance before the Court is no ordinary occasion. Government lawyers and many others, particularly older ones, adhere to the custom of formal morning dress. The Clerk's Office advises that either this or a dark business suit is appropriate. But the informality which permeates all official life has penetrated the Court. It lays down no rule for its Bar.

No toleration, however, can repeal the teaching of Polonius that "The apparel oft proclaims the man." You will not be stopped from arguing if you wear a race-track suit or sport a rainbow necktie. You will just create a first impression that you have strayed in at the wrong bar. For raiment of counsel, like the robe of the judge, is taken as somewhat symbolic of his function. In Europe the advocate, as well as the judge, is expected to robe for his appearance in court. The lawyer of good taste will not worry about his dress, because instinctively it will be that

which is suitable to his station in life—a member of a dignified and responsible profession—and for an important and somewhat formal occasion.

What Remedies Are Open to Disappointed Lawyer?

In most courts the folklore of the profession gives the aggrieved lawyer a choice of remedies: One is to appeal, the other is to go down to the tavern and cuss out the court. He may, and usually does, pursue both simultaneously. But the tavern cussing of the Supreme Court has to be stronger than usual, to compensate for the lack of any appeal. In Washington it will be easy for a disappointed lawyer to find sympathetic companions. We are never surprised nor angered when disappointed counsel avails himself of the one relief left to him. Sometimes one or more dissenting Justices would like to join him.

I think it was Mr. Justice Brandeis who said that a judge often must decide a case as if he were 100 per cent convinced one way or the other, although usually he is not more than 55 per cent convinced. Many decisions prevail by a narrow margin of Justices and the decisive Justices admit a large margin of doubt. More than a few court opinions represent a compromise of reasoning, if not of result. While I recognize the annoyance to the Bar of dissenting and concurring opinions, I think they are the lesser of evils. A court opinion which puts out a misleading impression of unanimity by avoiding, or confusing, an underlying difference is a false beacon to the profession. Far better that the division be forthrightly exposed so that the profession will know on what narrow grounds the case rests and can form some estimate of how changed facts may affect the alignment in a subsequent case.

If you are inclined to think the Court has given too little time to your case, or too superficial consideration to your contention, it may be some comfort to know that in most cases I, for one, would agree with you. Few decisions are handed down to which I do not wish it were possible for me to give more time and study. From the viewpoint of the Bench, yours is but one of a dozen cases to be argued in the same week; it is but one of over two hundred cases to be decided on the merits during the term and is but one of a thousand or twelve hundred cases in which we have to pass on petitions for relief during the year. The printed pages filed in these cases are several times those which any judge, if he could give twenty-four hours a day to the task, would be able to read.

Some of the most thoroughly prepared men, by learning and practice, who have come upon the Supreme Court bench have found it necessary to "scorn delights and live laborious days" to satisfy their own sense of duty. Justices Brandeis and Cardozo were almost as retired as hermits and Chief Justice Hughes withdrew from all social engagement, except one night a week which he allowed Mrs. Hughes to bestow on their friends. Judges practicing self-denial under such pressure may well be impatient of surplusage, irrelevance, and professional incompetence.

The Art of Advocacy Is an Exacting One

So long as controversies between men have to be settled by judges, proficiency in the art of forensic persuasion will assure one of first rank in our high calling. In the judicial process, as practiced among English-speaking peoples, the judge and the advocate complement each other, for, as Thoreau said, "It takes two to speak the truth—one to speak and another to hear."

But if not a lost art, advocacy is an exacting one. When he rises to speak at the bar, the advocate stands intellectually naked and alone. Habits of thought and speech cannot be borrowed like garments for the event. What an advocate gives to a case is himself; he can bring to the bar only what is within him. A part written for him will never be convincing.

If you aspire to such a task, and I address particularly the younger men at the bar and in the schools, do not let your preparation wait upon a retainer. There is not time to become an advocate after the important case comes to you. Webster, when asked as to the time he spent in preparing one of his memorable arguments, is said to have replied that his whole life was given to its preparation. So it is with every notable forensic effort.

The most persuasive quality in the advocate is professional sincerity. By that I do not mean that he believes in his case as the Mohammedan does in his Koran. But he must believe that under our adversary system both sides of every controversy should be worthily presented with vigor—even with partisan zeal—so that all material for judgment will be before the Court and its judgment will suffer no distortion. He must believe with all the intensity of his being in law as the framework of society, in the independent judicial function as the means for applying the law, and in the nobility of his profession as an aid in the judicial process. He will feel equal disdain for a judge partisan in his favor and one partisan in his opposition. The opportunist, the lawyer for revenue only, the cynic, will never reach the higher goal.

The effective advocate will not let mastery of a specialty foreclose that catholicity of interest essential to the rounded life and the balanced judgment. He will draw inspiration not alone from the literature of the law, but from the classics, history, the essay, the drama and poetry as well. It is one of the delights and intellectual rewards of the legal profession that it lays under tribute every science and every art. The advocate will read and reread the majestic efforts of leaders of his profession on important occasions, and linger over their manner of handling challenging subjects. He will stock the arsenal of his mind with tested dialectical weapons. He will master the short Saxon word that pierces the mind like a spear and the simple

figure that lights the understanding. He will never drive the judge to his dictionary. He will rejoice in the strength of the mother tongue as found in the King James version of the Bible, and in the power of the terse and flashing phrase of a Kipling or a Churchill. And the advocate will have courage—courage to assert his conviction that the world is round, though all about him men of authority say it is flat. Most memorable professional achievements were in the face of opposition, abuse, even ridicule.

The advocate may be summoned often to other forums, but he will appear in the Supreme Court of the United States only when that tribunal has been satisfied that decision of his cause is important to the body of federal law. Emphasis on the public interest in a just and uniform legal system has submerged emphasis on special equities and individual interests which properly prevail in trial and intermediate courts.

Adequately and helpfully to present a case—as it is about to be transformed into a precedent to guide future courts, to settle the fate of unknown litigants, perhaps to become required reading for a rising generation of lawyers—will challenge and inspire the true advocate. Decisional law is a distinctive feature of our common-law system, a system which can exist only where men are free, lawyers are courageous and judges are independent. To participate as advocate in supplying the basis for decisional law-making calls for vision of a prophet, as well as a profound appreciation of the continuity between the law of today and that of the past. He will be sharing the task of reworking decisional law by which every generation seeks to preserve its essential character and at the same time to adapt it to contemporary needs. At such a moment the lawyer's case ceases to be an episode in the affairs of a client and becomes a stone in the edifice of the law.

As I view the procession of lawyers who pass before the Supreme Court, I often am reminded of an old parable. Once upon a time three stone masons were asked, one after the other, what they were doing. The first, without looking up, answered, "Earning my living." The second replied, "I am shaping this stone to pattern." The third lifted his eyes and said, "I am building a Cathedral." So it is with the men of the law at labor before the Court. The attitude and preparation of some show that they have no conception of their effort higher than to make a living. Others are dutiful but uninspired in trying to shape their little cases to a winning pattern. But it lifts up the heart of a judge when an advocate stands at the bar who knows that he is building a Cathedral.

Proceedings of the House of Delegates

(Continued from page 828)

be enacted as a desirable first step in the correction of existing abuses in the Federal control of the administration of state unemployment insurance programs and because its enactment would greatly strengthen state responsibility for sound administration of unemployment insurance; and

BE IT FURTHER RESOLVED, That a copy of the foregoing resolutions and the annexed report be sent to the President of the United States and to each Senator and member of the House of Representatives thereof, and that proper representation of the foregoing resolutions be made by this Association before the appropriate Congressional Committees.

Mr. Oliver explained that the federal Unemployment and Social Security Trust Fund now amounted to some $25,000,000,000, most of which had been spent by the Government and replaced with Government bonds. His Committee recommended disapproval of H.R. 3391 and H.R. 3396, he said, because those bills would result in unwarranted federal control of the unemployment insurance system at the expense of the states and in an unnecessary increase in the federal unemployment insurance tax. He declared that the purpose of H.R. 4133 was to return billions of dollars paid by the states to the Federal Government for administration of the Social Security Act which had not been used because they were not needed. While the Committee did not approve of all the provisions of H.R. 4133, he said that its benefits outweigh its faults and he urged its approval by the House.

The Committee on Retirement Benefits for Lawyers, speaking through its Chairman, George Roberts, of New York, asked the House to give its approval to a plan to defer income tax on savings of professional and other self-employed persons. Mr. Roberts pointed out the difficulty that lawyers and other professional men have in saving for their old age and possible retirement. The proposal recommended by the Committee would set up a savings fund administered by a bank which is a member of the Federal Reserve System. Self-employed and professional people would be allowed to make contributions to the fund. The amount of such contributions, not to exceed 10 per cent of the earned annual income or $7,500, would be tax exempt. The bank would administer the contributions and return the amount paid in, plus accumulations, at the death, disability or retirement of the person making them. Amounts disbursed from the fund would be taxable in the year during which they were paid out. Mr. Roberts said that bills containing this proposal had been introduced in Congress and moved adoption of the following resolutions in support of them:

RESOLVED, That the American Bar Association approve in substance the Keough and Reed Bills, H.R. 4371 and H.R. 4373, respectively, and the amendment of Senator Ives introduced on July 25, 1951, to H.R. 4473. A copy of the Keough Bill and a copy of the Ives amendment is attached as an exhibit to this report of our Committee.

BE IT FURTHER RESOLVED, That a

copy of the foregoing resolution and the annexed report be sent to the President of the United States and to each Senator and member of the House of Representatives and that proper representation of the foregoing resolutions be made by this Association before the appropriate congressional committees.

The House voted approval of the resolution and also voted to continue the Committee for another year.

Thomas L. Sidlo, of Ohio, Chairman of the Committee on Public Relations, reporting for that Committee, moved adoption of the following resolution, which the House approved without debate:

RESOLVED, That the Standing Committee on Public Relations be authorized to advocate the adoption by Congress of a Bill "To provide for the issuance of a special U. S. postage stamp commemorating the Seventy-fifth Anniversary of the American Bar Association in 1953, and in tribute to the American lawyers"; and to cooperate with the postal authorities to see that the Bill, if and when adopted, is given full and proper effect.

Mr. Sidlo said that the Committee was continuing its work on a manual on public relations that should be of real value to bar associations when finished. He reported that the Committee also is assembling a library on public relations material and is studying the feasibility of making a documentary film about lawyers and the courts.

President Fowler, in his report to the House, spoke particularly of the work of the Membership, American Citizenship and Communist Committees. He said that he hoped that the time was not far off when the new Association Headquarters building would be a reality and that his travels during his year as President had convinced him that the American Bar Association is universally respected. " . . . I have never once, at any time, or any place, heard us accused of being partisan, or political to any extent in anything that we have done", he declared.

There were no recommendations requiring action by the House in the report of the Committee on Communications. Ben S. Fisher, of the District of Columbia, Chairman of the Committee, mentioned the promulgation of standards for color television broadcasts by the Federal Communications Commission and said that it was expected that the Commission will soon decide on the frequencies to be used for television stations. He reported that the agreement among the North American countries with reference to broadcasting frequencies is now before the Senate for confirmation but that the Senate is not expected to take the matter up until January.

Howard F. Burns, of Ohio, Chairman of the Committee on Federal Judiciary, reported that there had been thirty-nine vacancies on the Federal Bench since July, 1950, and that twenty-nine of the Committee's recommendations for confirmation of new federal judges had been followed by Congress. No one has been nominated for two of the vacancies for which the Committee has made recommendations; five nominations are pending before the Senate on which the Committee has made no recommendation; and two nominations opposed by the Committee have been rejected. Mr. Burns cited several instances in which a considerable delay in the appointment of new judges to fill vacancies had seriously handicapped the administration of justice.

Orison S. Marden, of New York, Chairman of the Committee on Legal Aid Work, called for the support of the leaders of the Bar and for the active work of members of the House in their communities to carry on the programs of legal aid. Observing that we are not making the progress that we should be making, Mr. Marden declared: "This job can be done almost overnight if we all put our shoulders to the wheel. We have a tiny committee engaged in field work which has to be on a hit-or-miss basis. We don't have the funds. We do not have the men. We cannot do the job without the full active support and work of thousands of lawyers throughout the United States." He declared that the tools of justice must be made available to everyone if the independence of the Bar is to be preserved.

The House then turned its attention to the amendments of the Constitution and By-Laws of the Association proposed by the House Committee on Rules and Calendar, of which David F. Maxwell, of Pennsylvania, is Chairman. All the amendments were approved by the House. They are printed below, followed by a summary of Mr. Maxwell's explanation of them on the floor of the House.

I

(1) Amend Article I, Section 4, of the By-Laws by adding at the end of Section 4 the following:

Any firm of lawyers, a majority of whose partners are members of the Association, may become a patron member of the Association upon payment of the sum of $250 annually, and the name of such firm shall be published in a firm patron membership roll. Patron membership as such shall not entitle any of the individual members of the said firm, to any of the rights or privileges of the Association.

The purpose of this amendment was to implement the recommendation of the Committee on Ways and Means to provide for patron memberships in the Association for firms of lawyers. The Ways and Means Committee felt that at least another quarter of a million dollars could be raised within the next year for the building fund.

II

Amend Article II by rescinding Section 2 thereof (relating to the quarterly pro-ration of dues of newly elected members of the Association) and renumber sections 3 to 7 inclusive of Article II to bear numbers 2 to 6 inclusive, respectively.

This amendment was a matter of administrative convenience. It gives the Board of Governors more latitude in prorating the dues of new members.

III

(1) Amend Article X, Section 6, of the By-Laws by inserting the following:

(a) A new line after line 9, Communications, to read:

Coordination of Bar Activities.

(b) A new line after line 12, Federal Judiciary, to read:

Judicial Selection, Tenure and Compensation.

(c) A new line after line 15, Law Lists, to read:

Lawyer Referral Service

(2) Amend Article X, Section 7, of the By-Laws by adding a new subsection to follow subsection (g), as follows:

Committee on Coordination of Bar Activities. This committee shall formulate and recommend plans for the integration and coordination of activities of the American Bar Association with those of state and local associations. The committee shall have the responsibility of giving effect to such plans as are approved by the House of Delegates, or, when occasion may require, by the Board of Governors.

(3) Amend Article X, Section 7, of the By-Laws by adding a new subsection to follow subsection (j), as follows:

Committee on Judicial Selection, Tenure and Compensation. The committee shall study and collect data on judicial selection, tenure and compensation, and report from time to time to the Association and to state bar associations with respect thereto.

(4) Amend Article X, Section 7, of the By-Laws by adding a new subsection to follow subsection (l), as follows:

Committee on Lawyer Referral Service. This committee shall study and report on methods of making legal service more readily available to persons of moderate means, and shall encourage and assist local bar associations and other agencies to accomplish this purpose.

(5) Reletter all subsections of Article X, Section 7, to run consecutively.

The effect of this amendment was to make the three Special Committees into Standing Committees.

(6) Amend Article IX, Section 1, of the Constitution, by adding the following, after the word "nomination", in lines 16 and 17:

"In the event the meeting of State Delegates for nomination of the officers of the Association or members of the Board of Governors is held in conjunction with a meeting of the House of Delegates, if a State Delegate shall fail to register in attendance at such meeting of the House of Delegates by 5:00 P.M. on the opening day thereof, the state bar association delegate from that state then present, with the greatest length of continuous service (or, if there be two or more present with equal length of service, one of them selected by lot by the Chairman of the House of Delegates), shall act as State Delegate from that state at such meeting of State Delegates."

The foregoing resolution was the work of both the Committee on Rules and Calendar and of the Committee on Scope and Correlation. Under the old provision, a State Delegate who found it impossible to attend a meeting of the House at which officers and members of the Board of Governors were to be elected was forced to resign in order to keep his state from losing its ballot. The new amendment eliminates the expense and trouble of electing a new State Delegate by providing that the senior state bar association delegate shall serve as State Delegate pro tem.

IV

Amend Article II, Section 3, of the Constitution by inserting before the word "disbarment" in line 8, the words "suspension or" so that lines 6 to 9 will read as follows:

Any member shall be automatically dropped from membership upon the filing by any person with the Secretary of a certified copy of the final order for the *suspension or* disbarment of such member by any tribunal of competent jurisdiction.

Mr. Maxwell explained that when a member is suspended from practice, he is no longer a lawyer and therefore is ineligible for membership.

V

Amend Article VI, Section 6, of the Constitution by deleting from line 5 the words "according to last preceding federal census" so that lines 3 to 8 of Section 6 will read as follows:

State Bar Associations in States which have in excess of two thousand lawyers shall be entitled to one additional delegate for each additional one thousand lawyers above such two thousand; provided, however, that no State Bar Association shall have more than four delegates.

Chairman Maxwell explained that membership in the House is based on the number of lawyers in each state. Any state with more than 2000 lawyers is entitled to an additional delegate for each 1000 lawyers. The old provision for determining the number of lawyers in a state used the figures of the latest federal census. Several states with integrated Bars had irrefutable proof that they had a membership large enough to entitle them to another delegate. It was felt that the federal census was inaccurate and furthermore it was found that the lawyer population of any state often increases by more than 1000 within the ten-year period of the federal census. The new amendment would give the Credentials Committee the right to decide whether or not a state is entitled to an additional delegate. The original proposal would have used the lawyer population shown by the census, the certificate of the highest court in the state, or the certificate of the President and Secretary of the state bar association, whichever was largest, in determining the number of delegates. Mr. Maxwell said that his committee thought it best to leave the whole matter up to the Credentials Committee.

The House then voted to increase the size of the Committee on Legal Service to the Armed Forces from five to six members and to continue the Committee. There was no formal report from this Committee.

Admiralty Committee Makes Two Recommendations

Arnold W. Knauth, of New York, Chairman of the Committee on Admiralty and Maritime Law, made two recommendations. The first contained an endorsement of the proposed foreign ship mortgage bill. This bill was approved by the House of Delegates last year but was not enacted by the Congress. Mr. Knauth explained that this resolution was identical with that of the year before except that the number of the bill had been changed. The first resolution, adopted by the House without debate, was as follows:

RESOLVED, That the recommendations made in 1950* in support of a bill in aid of the ranking and enforcement and foreclosure of foreign mortgages on foreign-flag ships in American waters, be renewed and reaffirmed in respect of S. 1286, 82nd Congress, 1st session (Mr. Magnusson), a substantially identical bill for the same purpose; and that the Congress be requested to give careful attention to this bill, which expresses a need of both private and public American

* 75 A.B.A. Rep. 126, 171 (1950).

capital invested in foreign-flag shipping.

The second resolution proposed by Mr. Knauth and adopted by the House was as follows:

RESOLVED, That the American Bar Association supports the proposals of the Maritime Law Association in respect of certain proposed additions and restorations to the General Admiralty Rules, namely: relating to depositions de bene esse, depositions of opposing parties and other persons for discovery, subpoena power (running 100 miles in a district near the place of trial or deposition), and depositions prior to suit (perpetuam rei memoriam); the correction of a drafting error of phraseology in Rule 54 (place where a limitation petition may be filed); and a summary judgment rule to reduce delays in unmeritorious cases.

And further resolved that the suggestion of a catch-all rule applying the FRCP to Admiralty cases as proposed by the Attorney General to the Judicial Conference in September 1950, is strongly opposed.

Mr. Knauth said that the new general admiralty rules (dealt with in the first paragraph of the resolution) had met with general approval among members of the Bar. The proposal dealt with in the second paragraph, as to superimposing the Federal Rules of Civil Procedure upon the admiralty rules, was felt to be unwise, because the Federal Rules are designed to enable lawyers to conduct litigation under the common law and the common law methods do not fit the needs of shipowners. Ships come and go from and to places that have systems of law vastly different and which are unknown to the common law but which are known to admiralty law.

The last item of business taken up by the House at this session was approval of a motion to continue the Special Committee on Divorce and Marriage Laws and Family Courts. That Committee had no formal report to make to the House.

The following recommendation was adopted:

That the committee be continued to serve as a liaison body between the American Bar Association and its creature, the Interprofessional Commission on Marriage and Divorce Laws.

The House recessed at 12:05 P.M.

THIRD SESSION

■ At this session of the House, the Committees on Regional Conventions, Lawyers in the Armed Forces, Mobilization Information and Military Justice made their reports. A proposed amendment to Canon 27 of the Professional Ethics Canons was debated at considerable length. The House finally adopted an amendment permitting patent and admiralty lawyers to designate those fields as specialties on their letterheads and shingles. The House also adopted three recommendations of the Committee on Civil Service.

■ The House convened for its third session at 9:40 A.M., Wednesday, September 19, with Chairman Willy presiding.

Albert B. Houghton, of Wisconsin, Chairman of the Special Committee To Supervise the Traffic Court Program, reviewed the history of the Committee briefly in his report to the House. He pointed out that the members of the Committee were of the opinion that the nature of the traffic court program made it a matter for action by individual states and that the Committee were working to transfer their activities to a state level. He moved that the Committee be continued for a five-year period by which time the transfer to the states should have been completed. On the motion of Joseph D. Calhoun, of Pennsylvania, Assistant Secretary of the Association, speaking for the Board of Governors, Mr. Houghton's motion to continue the Traffic Court Committee for five years was referred to the Committee on Scope and Correlation. Mr. Calhoun explained that there was no provision in the By-Laws for continuing a special committee for more than one year and that the purpose of his motion was to enable the Committee on Scope and Correlation to prepare a necessary amendment to the By-Laws. The House voted in favor of the referral and for the continuation of the Traffic Court Committee for one year in the meantime.

E. Smythe Gambrell, of Georgia, reporting for the Committee on Regional Conventions in the absence of its Chairman, Burt J. Thompson, of Iowa, said that the Atlanta and Dallas Regional Conventions had been outstanding successes. He said that the idea of regional meetings was no longer experimental and that they served a fine and constructive purpose in reaching lawyers who do not attend the Annual Meetings of the Association. He reported that several Regional Meetings were planned for the coming year, including conventions at Louisville, Kentucky, and for the area around Yellowstone National Park. On his motion, the Committee was continued for another year.

The Committee on Lawyers in the Armed Forces had filed a written report and had nothing to present that required the action of the House. On the motion of Secretary Stecher, the Committee was continued for another year.

Amendment of Canon 27 Stirs Up Debate

Edward L. Wright, of Arkansas, Chairman of the Special Committee To Study the Matter of Amendment to Canon 27, then reported for that Committee. Mr. Wright explained that the purpose of his Committee had been to draft a suitable amendment to Canon 27 of the Canons of Professional Ethics in order to resolve the problem which was created for the patent and admiralty lawyers by virtue of Opinions 277 and 281 of the Professional Ethics and Grievances Committee. Those opinions had ruled that a lawyer in those

fields might not state his specialty on his letterhead or shingle. He proposed the following result of the work of the Committee, saying that it was the most narrow that could be adopted and still be an amendment:

> It is not improper for a lawyer who devotes substantially his entire time to the practice of admiralty or of patent, trademark and copyright law to designate such specialty on his letterhead or shingle.

There was considerable debate in the House about this proposal. Henry S. Drinker, of Pennsylvania, Chairman of the Professional Ethics Committee, said that his Committee had not had an opportunity to pass on the proposed amendment. Their principal objection to such an amendment, he went on, was that it might open the way to designation of other specialties, which would give rise to interminable wrangling and discussion. He said that he did not believe that this proposal would be unacceptable to his Committee, however, since its terms were perfectly clear.

Cuthbert S. Baldwin, of Louisiana, said that he was opposed to the amendment. Its adoption, he declared, might lead lawyers who engage only in trial work or in probate law to demand recognition of those fields as specialties.

Arnold W. Knauth, Chairman of the Admiralty and Maritime Law Committee, said that admiralty was a matter of exclusive federal jurisdiction under the Constitution and that lawyers admitted to federal courts were sworn as proctors in admiralty as well as attorneys and counsellors at law. He declared that to say that a lawyer may not put on his letterhead the words which the United States courts use flies in the face of what the federal judges have done since 1789.

Chairman Willy ruled that the matter should be referred to the Professional Ethics Committee under Section 7 of Article IX of the By-Laws of the Association, which provides that matters concerning amendment of the Canons of Ethics shall come from the Committee on Professional Ethics.

Mr. Wright appealed from the ruling of the Chair on the ground that the Committee on Professional Ethics did not have the exclusive right of originating such amendments. The House sustained his appeal and overruled the Chair.

Floyd E. Thompson, of Illinois, declared that the proposed amendment would "open the door to a continuous demand for purposes of specialty advertising". He said that he doubted the propriety of any lawyer's advertising himself as a specialist in any field.

Virgil Woodcock, of Pennsylvania, was granted unanimous consent to address the House on behalf of the Patent Section. He said that the Committee on Professional Ethics had issued Opinion No. 277 after a long line of opinions recognizing the custom and usage of the Patent and Admiralty Bars. Patent lawyers resented the implication that they were guilty of unethical advertising, he observed, particularly since they have long been fighting advertising of every character. Members of the Bar are forbidden by federal law to call themselves "patent lawyers" or "patent solicitors" unless they have passed technical examinations, he pointed out, and he quoted Judge Miller of the Professional Ethics Committee, who dissented from its opinion, "The other members of the Committee feel that to permit the designation of patent lawyer on a letterhead would be letting down the bars to a flood of designations, such as tax lawyer, personal injury lawyer, criminal lawyer, corporation lawyer, etc. My answer to such fears is that no other designation, with the possible exception of admiralty lawyer, has a historical background in any way comparable to the designation of patent lawyer." Mr. Woodcock declared that the proposed amendment did not change anything —it merely codified a long line of decisions by the Professional Ethics Committee, all uniformly approving the present practice of patent and admiralty lawyers.

Frederic M. Miller, of Iowa, the dissenting member of the Professional Ethics Committee, said that this was not a trivial matter. If the amendment were to be defeated, he said, patent attorneys who are not lawyers would continue to designate themselves as such and they would be the only ones who could do so. Defeat of the amendment meant condemnation of a practice that was in existence long before the Canons of Ethics were adopted, he continued, and the patent lawyers would feel that they were unjustly condemned as unethical, a condemnation that they did not deserve. In reply to a question by Osmer C. Fitts, of Vermont, Judge Miller said that, while Canon 27 had been amended many times, none of the amendments had touched on this problem.

LeDoux R. Provosty, of Louisiana, moved to amend the amendment by substituting the word "exclusively" for "substantially". This motion was defeated after Mr. Knauth, of the Admiralty Committee, and Jennings Bailey, Jr., of the District of Columbia, Chairman of the Patent Section, protested that it was impossible for a lawyer to devote his entire time to admiralty or patent law.

Judge Dimock Proposes Substitute for Committee's Amendment

E. J. Dimock, of New York, proposed the following substitute for the language of the Special Committee:

> It is not improper for a lawyer who is admitted to practice as a proctor in admiralty to use that designation on his letterhead or shingle or for a lawyer who has complied with the statutory requirements of admission to practice before the patent office to so use the designation patent attorney or trade-mark attorney or trade-mark lawyer or any combination of those terms.

Mr. Knauth, Mr. Bailey and Mr. Wright all accepted this substitution. The House then voted to adopt Judge Dimock's substitute for the proposal of the Committee.

The report of the Committee on Judicial Selection, Tenure and Compensation was given by Chairman Morris B. Mitchell, of Minnesota. He said that there was continuing

progress in securing adoption of the Association's plan for selection of judges. Alabama had adopted it in November and New Mexico was holding an election on it during the week of the Annual Meeting. The state bar associations in Florida, Illinois, Indiana, Iowa, Michigan, Nebraska, Pennsylvania and West Virginia are actively campaigning for it. Mr. Mitchell said that, while selection of judges is one of the most important objectives of the organized Bar, the problem of adequate judicial compensation is pressing. He proposed a resolution favoring enactment by Congress of legislation providing for increases of salaries of federal judges and providing for payment of annuities to widows of federal judges. A second clause of the resolution called for state and local bar association committees to study the matter of salaries of state and local judges and to take action where such salaries were found to be inadequate.

Stuart B. Campbell, of Virginia, moved to amend the resolution by deleting reference to annuities for widows of judges. "We ought not to take the lead in trying to establish a precedent by which federal officers will be continued on the payroll after they have departed this life", he declared. Mr. Campbell's amendment carried.

Hatton W. Sumners, of Texas, congratulated the House on this action. He said that the Association should not recommend any additional expenditure of money that could be avoided. The House then voted, 51-46, to adopt the Committee's resolution in the following amended form:

> RESOLVED, That the House of Delegates of the American Bar Association recommends
>
> (1) That the Congress of the United States enact legislation providing for increases in salaries of federal judges, and
>
> (2) The House of Delegates recommends to each state and local bar association that it consider the appointment of a committee to study judicial salaries of all state and local judges in their respective jurisdictions, and, where such judicial salaries are found to be inadequate, to take suitable action to bring about increases in such salaries to adequate amounts.

Arthur T. Vanderbilt, of New Jersey, reported for the Survey of the Legal Profession in the absence of its Chairman, Judge Orie L. Phillips, of Colorado. Chief Justice Vanderbilt said that the work of the Survey is almost finished. He praised the Survey's director, Reginald Heber Smith, of Massachusetts, and predicted "tremendous development" in every line covered by the Survey—the professional services of lawyers and the availability of that service, public service by lawyers, judicial service and its adequacy, professional competence and integrity, the economics of the legal profession, and, finally, the work of the organized Bar.

Civil Service Committee Makes Three Recommendations

Murray Seasongood, of Ohio, Chairman of the Committee on Civil Service, presented three recommendations for the approval of the House. The first was this:

> H.R. 3700, 82nd Congress, 1st Session, introduced April 12, 1951, and referred to the Committee on Post Office and Civil Service entitled, "A Bill To Amend the Veterans' Preference Act of 1944 and to preserve the equities of permanent classified and unclassified civil service employees of the United States", is meritorious and, in principle, deserving of support.

Mr. Seasongood explained that, while no one was opposed to veterans' preferences, under the present law a veteran with but one month's service is entitled to retention over nonveterans with years of service. This bill was designed to correct this inequity by substituting a system of points for veterans when a layoff is necessary. The House voted to adopt the recommendation.

The second recommendation was as follows:

> Providing for "performance ratings" in place of the "efficiency ratings" previously given to civil service personnel is meritorious and deserving of support and wider adoption.

Mr. Seasongood explained that it was almost impossible to get an appointing officer to give an inefficient rating as a basis for discharge under the present efficiency-rating system, which makes it extremely difficult to dislodge an incumbent who has outlived his usefulness. The House adopted the recommendation.

Mr. Seasongood's third proposal was as follows:

> The allowance to an employee suspended pending charges and later fully restored to duty at salary less any amount earned during the time of separation from the service is meritorious and deserving of support.

He said that there are many jurisdictions where an employee who is wrongly suspended from the civil service does not get paid until he is reinstated and that it seems to be a matter of elementary justice that he should be reinstated with pay for the period he is wrongly excluded. John Kirkland Clark, of New York, spoke in support of this measure. It was adopted by the House.

Jo V. Morgan, Jr., of the District of Columbia, Chairman of the Committee on Mobilization Information, said that in May his Committee had been authorized by the Board of Governors to assist the Director of the Office of Defense Mobilization in taking the essential facts about mobilization to the public. The Office contemplated a speakers' bureau, he continued, and the Committee had been working through the Junior Bar Conference's program of public information which has already established a speakers' bureau. He said that the matter was delicate and the Committee was proceeding cautiously because of the danger of getting involved in political controversy.

Charles S. Burton, of the District of Columbia, speaking for the Junior Bar Conference on this subject said that the Conference approved continuation of the Committee on its present lines and moved that that be done. The motion was carried.

Control of Courts Martial Is Discussed

George Spiegelberg, of New York, Chairman of the Committee on Military Justice, reported that his Committee's efforts to eliminate

command control of courts martial had been unsuccessful. He said that he could not understand why a subject of such importance had not aroused Congress and the general public. While the new Uniform Code of Military Justice is an excellent piece of draftsmanship and contains many excellent procedural reforms, Mr. Spiegelberg declared that so long as commanders retained power to appoint courts martial it can hardly be called a system of justice.

He proposed the following resolutions, which are printed here incorporating amendments offered on the floor of the House:

RESOLVED, That the Special Committee on Military Justice be continued; and be it further

RESOLVED, That for and in the name of this Association, its appropriate officers, governors, delegates and members, its Special Committee on Military Justice, with the specific consent of the Board of Governors or a committee thereof, do all acts and things necessary and proper, including the right to appear before Committees of the Congress and any other tribunal, including the Court of Military Appeals, to urge the enactment into law of such amendments as will prevent command control of courts martial and thus make the Courts-Martial system of the Armed Services of the United States a true system of justice before whose tribunals the citizens of the United States may be assured of a fair and impartial trial while serving in the Armed Forces of their country.

Captain George W. Bains, U.S.N., a member of the Committee who had filed a dissenting report, was enthusiastic about the new Uniform Code. He said that he also wanted to eliminate command control but that he did not think it was prevalent in the Armed Forces. He pointed out that attempt by a commander to influence a military court was made an offense under the Code. He said that he felt the Committee could be useful when legislation was presented to Congress "to amend the law in an attempt in any way possible to stamp out command control". He declared that the military courts do render justice. The House, however, adopted the resolution as presented by the Committee.

The report of the Committee on Lawyers' Reference Service, was given by its chairman, William M. Wherry, of New York. His oral report stressed the difficulty of educating both the Bar and the public on the needs of a lawyers' reference service and the importance of the work in combating unauthorized practice, Mr. Wherry had a resolution which he presented to the House. It was as follows:

RESOLVED, That the American Bar Association reaffirms its conviction that the promotion of Lawyer Reference Plans is a project of the first importance to the legal profession in the United States; and be it further

RESOLVED, That during the coming year renewed and more vigorous efforts be made by the officers of the Association and the Committee on Lawyers Reference Service to promote the establishment of such plans as expeditiously as possible in areas where there is a need for them; and be it further

RESOLVED, That all practical assistance by the Association be extended to the Committee on Lawyers Reference Service to assist it in the attainment of this objective.

This was adopted as presented by the Committee with one minor change recommended by the Board of Governors. The language given above incorporates the change.

The House recessed at 12:25 P.M.

FOURTH SESSION

■ During the fourth session, the Committees on Customs Law and Commerce and the Sections of Corporation, Banking and Business Law and Legal Education and Admissions to the Bar reported to the House. The Committee on Draft reported on six resolutions that had been referred to it, including an interesting proposal for limiting the power of Congress to tax incomes. The reports of the Committee on Peace and Law Through United Nations and of the Section of International Law stirred up considerable debate. A resolution to study creation of an international criminal court was referred to the Peace and Law Committee, the International Law Section and the Section of Criminal Law.

■ Chairman Willy called the House to order for its fourth session at 9:30 A.M., September 20.

The first order of business at this session was the report of the Committee on Customs Law, given by its Chairman, Albert MacC. Barnes, of New York, Mr. Barnes moved the adoption of the following recommendation:

That this committee be authorized to present and seek the adoption of the following amendment to H.R. 2641:

Sec. 203, lines 22 to 24, strike out the words "District Court of the United States in which such taxes or fee was collected, or in which such vessel was measured," and substitute the words, "United States Customs Court."

Sec. 1207 (c) lines 16 and 17, strike out "a District Court of the United States," and substitute the words, "United States Customs Court."

He explained that H.R. 2641 is an attempt to codify the navigation laws of the United States, which at present are scattered throughout the federal statutes. The two sections mentioned in the recommendation provide for decisions on customs duties by the Secretary of the Treasury with ultimate review by United States district courts. The purport of the Committee's recommendation was to authorize it to seek legislation placing the power of review in the hands of the Customs Court rather than the district courts, Mr. Barnes said.

The House approved the recommendation.

The Committee on Court of Claims made no oral report. On motion of the Secretary, the House voted to continue that Committee for another year.

Edward R. Johnston, of Illinois, Chairman of the Committee on Commerce, proposed a resolution that would have put the Association on record as favoring an amendment of Section 1 of the Sherman Act so as to protect trade and commerce against restraints of commercial

competition by labor organizations. Mr. Johnston said that, prior to the decision of the *Hutcheson* case by the Supreme Court, labor unions had been generally considered to be subject to Section 1 where, when not acting in concert with outsiders, they fixed prices, attempted to control those who could or could not enter a given industry, denied the use of labor-saving machinery or impeded the use of technological improvements. The *Hutcheson* decision changed the law on this point. He said that the purpose of this recommendation was to urge an amendment to return to the law as it existed before the *Hutcheson* opinion.

Clif Langsdale, of Missouri, Delegate of the Section of Labor Relations Law, declared that his Section had not had an opportunity to study the proposal. He moved that the proposed resolution be referred to the joint Subcommittee of the Committee on Commerce, the Section of Corporation, Banking and Business Law and the Section of Labor Relations Law, with instructions to report on the matter at the Mid-Year Meeting.

Albert E. Jenner, Jr., of Illinois, said that labor unions were absolutely above the law when it came to this situation. He declared that the matter should not be referred to the Section of Labor Law to be pocketed, or at least delayed, for six months. Barnabas F. Sears, of Illinois, said that he did not share Mr. Jenner's views that the Labor Section would not act upon the matter. The subject was not so limited as Mr. Johnston suggested, he said, and the Labor Section's viewpoint should be obtained.

The House voted to refer the matter to the joint subcommittee as moved by Mr. Langsdale.

Mr. Johnston then reported for the joint Subcommittee of the Committee on Commerce, the Corporation Section and the Labor Section, of which he is also chairman. He reminded the House that the Subcommittee had been set up to consider the problem of the regulation of labor unions in so far as their activities imperil the national health, welfare or safety. The Subcommittee had been unable to make any progress toward agreement by approaching the problem through the antitrust laws, he said, and accordingly had turned to amendment of the Taft-Hartley Act. Suggested changes for strengthening the right to injunctional relief in emergency cases were agreed upon by a majority of the members of the Subcommittee. The Council of the Section of Labor Law, however, refused to approve the principle involved in the suggestions and, in view of the fact that the work of the Subcommittee was to be the joint action of its three parent organizations, he said that he felt that it would be unwise to insist upon action at present. He moved that the Subcommittee be continued with directions to report at the Mid-Year Meeting. This motion was carried.

Draft Committee Reports on Six Resolutions

The House then turned to the report of the Committee on Draft, headed by Charles S. Rhyne, of the District of Columbia. Mr. Rhyne said that six resolutions had been referred to his Committee for study.

The first of these was by Edwin M. Otterbourg, of New York, and, with the consent of both sponsors, the Committee had combined this with one offered by Loyd Wright, of California, which dealt with the same matter. The Section of Administrative Law had adopted a similar proposal and its resolution was also incorporated.

The resolution, which was adopted without debate, was as follows:

> WHEREAS, the federal Administrative Procedure Act of 1946 was enacted largely through the efforts of the American Bar Association and this Association has since (House of Delegates, February 27, 1951, 37 ABA Journal 322) declared that all the reasonable safeguards provided by that Act are required to protect the essential rights of the public to due process of law before federal administrative agencies, be it
>
> RESOLVED, That the American Bar Association approves in principle the repeal of all federal laws or parts of laws which grant exemptions to federal administrative agencies from the provisions of the Administrative Procedure Act and approves the provisions of S. 1770, a bill introduced by Senator McCarran for that purpose, and
>
> BE IT FURTHER RESOLVED, That the president is hereby authorized to appear, or to designate a member of the Association to appear, before the appropriate committees of Congress to present the views of the Association in support of this Resolution.

The second resolution, offered by Arthur Littleton, of Pennsylvania:

> WHEREAS, Few if any of the States, Territories and District of Columbia maintain a complete official current register of persons legally entitled to practice law in such jurisdictions, be it
>
> RESOLVED, That the Committee on Unauthorized Practice of the Law be and is hereby directed to report to the House of Delegates at the next Midwinter Meeting a method whereby such a complete official list of persons entitled to practice law in the several States, Territories and District of Columbia shall be established and currently maintained by Legislation or Rule of Court; and further be it
>
> RESOLVED, That to this end the "Conference of the Chief Justices" be requested to give full aid and assistance to the said Committee".

Mr. Rhyne said that a few states have such lists, but that the Committee were greatly impressed with the need for them and the value they would have for both lawyers and judges. In reply to a question by Cuthbert S. Baldwin, of Louisiana, William Clarke Mason, of Pennsylvania, said that an official list would be a list of those persons entitled to practice law in the state in which the list is located. He said that there were many people listed as lawyers, particularly in the telephone books, who are not members of the Bar. He added that a list authenticated either under a statute, by rule of court or by an integrated Bar would be of great value.

The House voted to adopt the resolution.

The third resolution recommended by the Draft Committee was introduced by Thomas B. Gay, of Virginia, who presented it to the House at Mr. Rhyne's request. Briefly, it called for an amendment to the

United States Constitution fixing the federal income tax rate at 25 per cent, except on vote of three-fourths of Congress when the rate could be as high as 40 per cent; during a war or other national emergency there would be no limit. Mr. Gay said that the National Government had arrogated to itself the right to take the power to support the state governments from the people by what he said were excessive taxes. He explained that he was not attempting to completely destroy the power of Congress and that the amendment had been designed so as not to cripple the National Government during an emergency.

William Logan Martin, of Alabama, speaking in favor of the resolution, said that it would forestall the demand for a new federal convention, which might be extremely dangerous. He said that the amendment would not substantially reduce the income of the Federal Government, since taxpayers in the brackets above 40 per cent contribute a very small part of the government's income.

Samuel H. Liberman, of Missouri, said that the proposal would have serious and far-reaching consequences and moved that action on the resolution be deferred until the next meeting of the House.

Robert F. Maguire, of Oregon, proposed, as a substitute for Mr. Liberman's motion, that a special committee be appointed to consider the problem—a mere postponement of consideration was not enough, he said. Mr. Liberman accepted Mr. Maguire's substitution and the House voted to defer action and to refer the resolution to a special committee to be appointed by the President.

The fourth resolution presented by the Committee on Draft was introduced by James E. Palmer, of the District of Columbia, and read as follows:

WHEREAS, It is the sense of the House that the right to trial by jury now existing in the vast majority of states should be preserved in condemnation of land cases in our Federal Courts.

NOW, THEREFORE, BE IT RESOLVED, That the House endorse Senate Bill No. 1958, 82nd Congress, as it unanimously passed the Senate restoring this traditional right of parties litigant which was abolished as a right on August 1, 1951, on which date the Conformity Act no longer applied to Federal Eminent Domain proceedings in the United States District Courts.

Mr. Rhyne explained that the right to trial by jury in condemnation cases was ended in forty-four states in August when Rule 71 (a) of the Federal Rules became effective. Rule 71(a) provides for a commission to determine the amount of award in such cases. This resolution supported a bill to restore the right to a jury trial.

Albert E. Jenner, Jr., of Illinois, spoke against adoption of the resolution. The new rule had the approval of the Section of Real Property, Probate and Trust Law, of the Supreme Court Advisory Committee, the district judges of the United States courts and of the Department of Justice, he declared. It had been approved last year by the House of Delegates. He took no position on the merits of the rule, declaring that the issues were whether the House of Delegates ought to reverse itself on an action taken only the year before at the Washington meeting, and whether the House ought to endorse an encroachment upon the rule-making power of the Supreme Court. Mr. Jenner declared that the Association was entitled to the credit for obtaining the Enabling Act which resulted in the Federal Rules and that it should not take an action opposed to that Act.

Charles M. Lyman, of Connecticut, said that the Association's policy had always been in favor of full rule-making powers for the courts. To advocate passage in Congress of a bill to change a rule is to strike a lusty blow at the rule-making power, he said. He thought that the Association should urge change of the rule by the Court if it thought that the rule was wrong.

Mr. Palmer, the author of the resolution, said that the question was not whether there was an encroachment on the rule-making authority of the courts. He said that this was a question of restoring a substantive right to trial by jury in compensation cases.

John C. Satterfield, of Mississippi, said that the right of courts to make rules has always been subject to legislative limitations placed on it and that therefore he could see no conflict between the resolution and the Court's rule-making powers.

The House voted to adopt the resolution.

The last resolution to be presented by the Committee on Draft was as follows:

WHEREAS, Lawyers traditionally have been the exponents of individual freedoms in this country; and

WHEREAS, These individual liberties are now dangerously threatened by present economic trends; and

WHEREAS, The New Jersey State Bar Association has sponsored a series of lectures on "The Economy in Time of Crisis: Its Meaning to Lawyers and Their Clients," which have been distributed in printed form to 100,000 statesmen, judges, lawyers, teachers and influencers of public opinion throughout the United States; and

WHEREAS, The Board of Governors of the American Bar Association has approved the distribution of this pamphlet to members of this Association; and

WHEREAS, It is highly desirable that the members of the bar throughout the United States be better informed of these economic perils which confront our nation in order that they may properly advise their clients and themselves;

THEREFORE BE IT RESOLVED, That the House of Delegates of the American Bar Association urges the New Jersey State Bar Association to further develop and make effective a nationwide program to inform the public of these present threats to our freedoms; and

BE IT FURTHER RESOLVED, That the President, Board of Governors, and other officers of this Association are requested to cooperate with the New Jersey State Bar Association in making effective this program of public information; and

BE IT FURTHER RESOLVED, That this House of Delegates recommends to state and local bar associations represented in this House that they develop similar programs to that of New Jersey and present them to the members

of the respective associations and other influential groups in their state and community.

The resolution was adopted without debate.

Section of Labor Law Reports to House

Barnabas F. Sears, of Illinois, incoming Chairman of the Section of Labor Relations Law, reported for that Section. He summarized the activities of the Section for the last year, mentioning particularly the work of the Section's Committees on State Labor Legislation, Railway Labor Act, Improving the Administration of Union-Employer Contracts, Wage-House Legislation and Federal Legislation. Terming the last the "whipping boy assignment" of the Section, he declared that the value of its work should not be measured in terms of number of resolutions presented to the House for action. "The intangible benefits to this Association and to the public accruing from the social and professional contacts between the leading management and union lawyers throughout this land as a result of their common activity in the affairs of this Section are incalculable." Mr. Sears moved that the House approve a new Section By-Law increasing the Section dues from three dollars to five dollars a year. The change was approved without debate.

John W. Kearns, of Illinois, speaking for the Section of Corporation, Banking and Business Law, presented the following resolution:

> It is hereby recommended that the American Bar Association urge the Federal Trade Commission to take all necessary steps to insure that public statements and press releases of the Commission, or its staff, as to the issues in litigated cases shall be in accord with the views urged by the Commission, or its staff, in those cases.

Mr. Kearns explained that there had been at least eleven instances in which the Commission's counsel has taken one position with reference to competitive pricing before the courts at the same time that others of the Commission have been taking different positions before the Congress.

The House voted to adopt the resolution.

Howard L. Barkdull, of Ohio, President of the National Conference of Commissioners on Uniform State Laws, reported for the Conference. His report outlined the general provisions of the new Uniform Commercial Code which he called the "most important single item that has ever been brought by the Conference of Commissioners to the American Bar Association for approval". He emphasized the fact that the new Code is the work of both the Conference and the American Law Institute, who have discussed and debated its various articles section by section at joint meetings for several years.

On Mr. Barkdull's motion, the House voted unanimously to approve the new Code.

Treaty Law Question Is Discussed

The House then turned to consideration of the reports of the Committee on Peace and Law Through United Nations and the Section of International and Comparative Law, given by the Chairmen, Alfred J. Schweppe, of Washington, and Charles W. Tillett, of North Carolina, respectively. Mr. Schweppe presented the first resolution, which had the approval of both the Committee and the Section, authorizing the continuation of the joint study being made on the constitutional aspects of international treaties. He said that the two groups have been studying the possibility of a constitutional amendment to prevent any destruction of the balance between state and federal powers by the use of the treaty-making process. Proposed drafts of constitutional amendments dealing with the problem will be before the House at the Mid-Year Meeting, he said. Meantime, the two committees had concluded that the reservation method should be used in the interval prior to the adoption of a constitutional amendment. He also said that they were considering asking Congress to pass an appropriate bill giving a proper definition of genocide, with proper penalties, independent of any convention. He then moved adoption of the first resolution:

> Resolved, That the joint report of progress in the study of constitutional aspects of international treaties, made by the Standing Committee on Peace and Law Through United Nations and the Section of International and Comparative Law be received; that the joint and several study be continued, and that a joint or separate report be made to the House of Delegates at its next Mid-Winter Meeting.

Frank E. Holman, of Washington, said that many people throughout the country would be disappointed at the postponement of decision by the Association on a constitutional amendment dealing with the treaty power. The legislatures of California and Colorado have sent proposed texts of such an amendment to Congress, Mr. Holman said, and other organizations have drawn drafts. He said that the American Legion and the Veterans of Foreign Wars had both promised support to an amendment the text of which the Association had approved. Several of the proposals sent to Congress are verbose and restrict the treaty power too much, he declared, saying that this power should be restricted in two respects only: so that no treaty could unbalance the relationship between the states and the Federal Government and so that no treaty could subject an American citizen to trial in a foreign court. Mr. Holman said that the question of an amendment could be debated for a hundred years, but that action was needed now.

The House voted to approve the first recommendation.

Mr. Schweppe then moved adoption of the following resolution:

> Resolved, that the American Bar Association is of the opinion that the Draft International Covenant on Human Rights as prepared at the April-May, 1951 session of the United Nations Commission on Human Rights is not in such form nor of such content as to be suitable for approval and adoption by the General Assembly of the United Nations, or for ratification by the United States of America.

In support of this proposal, Mr. Schweppe said that the Human Rights Commission had undertaken

under a new mandate from the General Assembly to enlarge the Covenant for the first time by including economic, social and cultural rights, although it had originally been instructed to amend and restudy the articles dealing with civil and political rights. The Human Rights Commission had not had time to complete its work, he said, and had made no changes in the parts of the draft that were the subjects of criticism in his Committee's report last year.

Mr. Tillett moved an amendment to the resolution, adding at the end the words "and that it should be resubmitted by the General Assembly to the United Nations' Commission on Human Rights for further consideration of all its provisions with adequate time for the proper performance of this important work". Mr. Tillett said that the General Assembly had decided that civil and political rights, and economic, social and cultural rights should be included in one document; the Council apparently felt that it would be better to have them in two separate documents. His amendment, he said, would state the Association's opinion that the matter ought to be resubmitted to the Commission. If the General Assembly itself undertakes to rewrite the Covenant, Mr. Tillett said, the public would not have an opportunity to make their views known.

Mr. Schweppe said that the Human Rights Commission had not seen fit to request more time to work on the problem and that he did not see why the Association should ask for it for them on their behalf. It is not the function of the Association to tell the United Nations how it should deal with a particular problem in the future, he declared.

Mr. Holman called for the defeat of Mr. Tillett's amendment. He declared that it amounted to quasi approval of the Draft Covenant by the Association and that the Association had never before given quasi approval to a matter of this kind.

Charles S. Rhyne, of the District of Columbia, said that he thought that the Association should recommend that the General Assembly send the matter back to the Commission instead of working out the problem itself. If the Assembly works out the problem, he said, we shall never get a chance to study it or comment on it. "I think it would be dangerous for us not to make this suggestion", he declared.

Mr. Tillett said that there was no quasi approval of the draft in the language of his amendment. The important thing was to request the Assembly itself not to work on the Covenant, he declared.

The House voted against the amendment moved by Mr. Tillett and then voted to adopt the resolution as presented by Mr. Schweppe.

Continuing his report, Mr. Schweppe said that his Committee had adopted a resolution opposing an international criminal court for the trial of American citizens, but was withdrawing it from consideration at this time because a draft has been prepared under the U.N. proposing an international criminal tribunal. The Committee had not had an opportunity to see this proposal and therefore was deferring action on its resolution until after it had studied this new development, he explained.

Mr. Schweppe's last resolution was as follows:

> RESOLVED, That the American Bar Association authorizes its Committee on Peace and Law Through United Nations and Section of International and Comparative Law as occasion arises, to submit to the Congress of the United States, and to committees and members thereof, and to appropriate officers and departments of the United States and to the United States Delegation to the United Nations (a) the resolution passed by the House of Delegates this day regarding the Draft International Covenant on Human Rights; and (b) the resolutions heretofore passed by the House of Delegates regarding the Genocide Convention.
>
> In the event that either the Committee on Peace and Law or the Section of International and Comparative Law, or any member thereof, is invited to communicate his views to any of the aforementioned bodies or persons on a subject within the jurisdiction of such Committee or Section, as the case may be, the Chairmen of the Committee and of the Section shall be informed of such invitation and they may make such arrangements for the presentation as are appropriate, including authorization from the Board of Governors or a committee thereof.

He explained that, under the rules of the Association, no committee or member can speak for the Association before a public body unless specifically authorized to do so by the House of Delegates or the Board of Governors. The Committee was once asked to appear in Washington and the request for permission to do so required a long exchange of telegrams which turned out to be quite expensive. The resolution was intended to avoid that expense in the future, he said.

After some discussion, the House adopted the resolution.

Mr. Schweppe closed his report by saying that his Committee was not taking any action on a request made last year of it and the International Law Section to make recommendations of amendments to the United Nations Charter that would tend to make that document a more effective instrument for preserving the peace and preventing aggression. He said that the Committee felt that the time was not propitious for such a course, since no document could solve the cold war, and, if the cold war were solved, there would be no reason to doubt that the present U.N. Charter was reasonably adequate to deal with questions of preserving peace and preventing wars.

Three Groups To Study International Criminal Court

George Maurice Morris, of the District of Columbia, moved adoption of the following resolution:

> RESOLVED, That the matter of the subject of and the jurisdiction of an International Criminal Court be referred to the Section of International and Comparative Law, the Section of Criminal Law, and the Committee on Peace and Law Through United Nations, for joint or separate study, and report to the House at its next meeting.

Mr. Morris said that a committee

of the United Nations had completed the draft of a statute for an international criminal court on August 31 and that that draft is now to be distributed by the United Nations to the various countries for their comments. The United States will be asked to express its view on the matter, he said, and it was appropriate that the American Bar should study the question so as to be able to give their advice to the United States Government.

Frank E. Holman, of Washington, said that he was opposed to the resolution. He declared that it was difficult to arrange meetings between the Committee on Peace and Law and the International Law Section and that the Morris resolution would add a third group which would make the problem even more complicated. The matter has been considered by the Committee on Scope and Correlation a number of times, Mr. Holman pointed out, and that Committee has defined the orbit of Section and Committee activity. He declared that the Criminal Law Section deals largely with domestic criminal law and said that he was sure that either the Committee on Peace and Law or the International Law Section would be glad to hear any international ideas the Criminal Law Section might have.

Mr. Morris replied that he thought that the American Republic thrives on controversy and that it was a good thing to have differing views of various groups. The Section of Criminal Law is the logical group to ask to consider a criminal court, he declared. If that Section disagrees with the Committee or the International Law Section, it will come in with its own report and the matter can be thoroughly discussed on the floor of the House, he said.

The House voted 64-40 in favor of the resolution.

Mr. Tillett, of the International Law Section, proposed the following resolution:

WHEREAS, It is considered advantageous to have persons occupying positions of influence in legal fields in foreign countries become familiar with our democratic laws and institutions by means of visits, courses of lectures and personal presence in courts, law schools, bar association meetings and similar institutions,

NOW THEREFORE, BE IT RESOLVED, That the American Bar Association pledges its support to exchange programs with respect to interchange of judges, lawyers, professors and law students, and urges the co-operation of state and local bar associations and other organizations of lawyers in the encouragement and carrying out of such interchanges.

The resolution was adopted after a brief discussion.

Charles H. Burton, of the District of Columbia, Chairman of the Junior Bar Conference, reported that the Conference's program of public information was continuing to receive widespread acclaim. In addition to the radio and television programs sponsored for the last several years, Mr. Burton said that the Conference was now setting up a Speakers' Bureau on Americanism. He reported that the American Law Student Association now has members in 82 of the 118 approved law schools in the country. The law student program endeavors to instill a professional sense in law students and to assist the students in bridging the gap between law school training and the problems of active practice.

Richard Bentley, of Illinois, Chairman of the Section of Legal Education and Admissions to the Bar, moved that resolutions be adopted giving provisional approval to the School of Law of Seton Hall University, Newark, New Jersey, and to the John Marshall Law School, of Chicago.

The House voted in favor of giving provisional approval to these schools and then recessed at 12:30 P.M.

FIFTH SESSION

■ During its fifth session, the House voted to approve six resolutions offered by the Section of Patent, Trade-Mark and Copyright Law and nine resolutions offered by the Section of Taxation. It also heard the report of the Committee on Lawyer Census and considered the proposals of the Committee on Jurisprudence and Law Reform, adopting five of the eight resolutions recommended by that Committee.

■ The fifth session of the House was called to order by Chairman Willy at 1:30 P.M. Thursday, September 20.

Jennings Bailey, Jr., Chairman of the Section of Patent, Trade-Mark and Copyright Law, presented six resolutions for action by the House. These resolutions are too long to be reprinted here, but may be summarized as follows:

1. A resolution supporting legislation to permit claiming of parts of a patentable combination in terms of the function of those parts.

2. A resolution approving the following principles:

(a) That one of several joint inventors, or the owner of an invention, may file a patent application thereon, if the other coinventors or the inventor are unable or refuse to make such application, the patent, however, in either case to be issued to the inventor or inventors in the absence of an assignment by the persons not executing the application;

(b) That a patent shall not be rendered invalid by the inadvertent failure to include all persons having a part in the invention, and that provision should be made for the addition of such persons as co-inventors either before or after the issuance of the patent.

3. A resolution approving the principle that related claims of a patent should not be held invalid on the ground that only one, or

less than all, of several inventors had a part in the invention covered by a part only of the claims.

4. A resolution approving the principle that co-owners of a patent, while each being free to make, use and sell the invention of the patent, should not be allowed to grant licenses or assign their interests without either the consent of the other owners or an accounting to such other owners.

5. A resolution approving the principle that persons who actively induce the infringement of a patent, or who sell a part of a patented combination knowing that it is to be used in infringement of the patent, should be held liable as contributory infringers.

6. A resolution approving the principle that the United States should be allowed, in defending a suit for patent infringement, to interpose as a defense knowledge within its own files, prior to the date of invention of the patent in suit, of the invention, provided that the use upon which the suit is based was derived from such knowledge; but disapproving the allowing of such a defense when the use did not result from such knowledge.

All these resolutions contained specific language of the proposed legislation or recommendation and all authorized the Section to communicate the action of the Association to interested parties.

The House voted to approve all the resolutions.

Section of Taxation Makes Nine Proposals

Morton P. Fisher, of Maryland, Chairman of the Section of Taxation, had nine resolutions from his Section to be acted upon by the House. These resolutions set forth proposed changes in the Internal Revenue Code in express language, and consequently are too long for publication here. They are summarized below:

1. The first resolution recommended retirement benefits for judges of the Tax Court of the United States and pensions for their widows. On Mr. Fisher's motion the portion of this resolution approving pensions for widows of judges was deleted, in line with the action of the House earlier (see page 869) refusing to recommend pensions for widows of other federal judges. The House then adopted the resolution as amended.

2. The Section's second resolution proposed that Congress delegate to the Supreme Court of the United States the power to adopt uniform rules of procedure on review of decisions of the Tax Court.

3. The third resolution advocated legislation permitting the filing of petitions in the Tax Court by registered mail, the petition to be deemed filed when mailed.

4. This resolution was intended to recommend freeing the Tax Court from the provisions of general legislation dealing with independent agencies of the Government unless the Tax Court was specifically mentioned. Mr. Fisher explained that, while the Tax Court is a court for all practical purposes, technically it is merely an independent agency of the executive branch. This is often overlooked by Congress when general legislation is passed relating to independent agencies, he said.

5. This resolution was aimed at relieving what the Section considered to be an injustice in the present tax law. If a taxpayer omits more than 25 per cent of his gross income from his tax return, the statutory period of limitations is extended from three to five years. The courts have construed this to apply even though full disclosure has been made to tax officials in a situation where there is a proper question as to whether certain items should be included in the gross return. The resolution favored an amendment to the Code to correct this inequity.

6. This approved a proposal reported out by the Senate Finance Committee. If an American corporation owns 50 per cent or more of the stock of a foreign subsidiary, it is entitled to certain foreign tax credits in relation to taxes paid by the subsidiary. If it owns but 49 per cent of the stock, no credit is allowed, and there is likewise no credit when three American corporations acting in concert establish a foreign subsidiary in which each owns one-third of the stock, even though the foreign company is wholly American owned. The resolution approved changes in the code granting a credit in the last two situations.

7. This resolution dealt with the following situation: Existing law permits certain deductions for war losses when the loss is deemed to have been incurred. There are many cases of subsequent recovery of the identical property. As the law now stands, if the value of the recovered property exceeds the value of its basis at the time of its loss, the increase in value is subject to tax, even though the identical property has been recovered and the taxpayer has not realized any actual gain by sale or other disposition of the property. The proposal favored by the resolution would tax the recovered property at the time of its subsequent disposition by the taxpayer and not at the time of its recovery.

8. This resolution provided for off-setting gains and losses in transactions between the same related persons in the same taxable year. Under present law, two persons deemed to be closely related who enter into transactions selling property one to another, are taxed on the gains but their losses are disallowed. Mr. Fisher said that his Section was in agreement with the principle but that the present provisions were not practical. The proposed change would reduce the number of loopholes and simplify the present statutes.

9. The last resolution favored exemption of the proceeds of life insurance paid by reason of the death of the insured even though the policy may have been transferred for valuable consideration. The Section's study of the matter, it was explained, has convinced it that Congress did not intend to make the proceeds of life insurance transferred for valuable consideration subject to income tax when the policy was

paid at death, as distinguished from a lifetime resale or cashing in of the policy.

The last eight resolutions proposed by the Section, summarized above, were all also adopted by the House.

Charles S. Rhyne, of the District of Columbia, presented the following resolution at the request of the Section of Municipal Law:

BE IT RESOLVED, By the members of the American Bar Association:

WHEREAS, The Section of Municipal Law has explored the possibility of joint study with other professional groups of problems of urban traffic congestion and has determined both that other professional groups are interested in participating in such an undertaking and that a project of this character would be feasible.

WHEREAS, By action taken at its meeting on September 16, 1951, the Council of the Section by motion approved preliminary action taken by the officers of the Section in relation to the organization of such a project and recommended that the Section participate in the project if approved by the House of Delegates of the American Bar Association.

THEREFORE, BE IT RESOLVED, That participation of the Section in a study of urban traffic congestion problems jointly with other interested professional groups and other interested organizations is hereby approved.

The House voted to adopt the resolution.

William W. Evans, of New Jersey, reporting for the Committee on State Legislation, said that a large number of uniform acts had been introduced in the legislatures of the various states during the last year. He mentioned the State of Texas in particular, since seven acts had been introduced there and seven had been passed. He noted that South Dakota and Wisconsin were leading the nation in the number of adoptions of Acts, having forty-nine and forty-seven respectively.

Herbert G. Nilles, of North Dakota, speaking for the Committee on Lawyer Census, made two recommendations, which were as follows:

1. That the time limit for submitting to headquarters the names of Committee and Section personnel be reduced from 60 to 30 days after the Annual Meeting.

2. That this Special Committee be continued.

Mr. Nilles explained that the change in the requirement for submitting names of Committee and Section personnel was necessary because Martindale-Hubbell now lists the official family in its directory and its deadline requires having the information available at an earlier date. He added that Martindale-Hubbell furnishes the plates for printing the official American Bar Association Directory (commonly known as the "Red Book"), which means a considerable saving to the Association.

The recommendations were approved without debate.

Jurisprudence Committee Submits Eight Resolutions

Leonard D. Adkins, of New York, Chairman of the Committee on Jurisprudence and Law Reform, had eight resolutions that required action by the House. The first of these was as follows:

RESOLVED, That the American Bar Association approves the submission to Congress and the enactment into law of a bill to amend Title 28 of the United States Code so as to make it clear that a corporation may sue the United States (when authorized to do so by Section 1346 of Title 28) either in the district in which it is incorporated or in any district in which it is doing business.

RESOLVED, That the Standing Committee on Jurisprudence and Law Reform be authorized to advocate the introduction and passage of such a bill in the Congress of the United States by all appropriate means.

Mr. Adkins explained that under the present law a corporation may sue the United States in tax cases but that the decisions are in conflict as to whether the suit may be brought

only in the district of incorporation or whether it may also brought in districts where the corporation is doing business.

The House adopted the resolution.

Mr. Adkin's second resolution was this:

> RESOLVED, That the American Bar Association disapproves and opposes the enactment into law of H.R. 2424 in the 82nd Congress entitled "A Bill to Require that Cases in Which The Supreme Court Has Original Jurisdiction be Decided by the Affirmative Vote of at Least Five Members of the Court" and directs the Standing Committee on Jurisprudence and Law Reform to oppose its passage by all appropriate means.

He explained that the Committee felt that the original jurisdiction of the Supreme Court was of no greater importance than its appellate jurisdiction.

The House voted to adopt this resolution.

The next resolution of the Committee reads as follows:

> RESOLVED, That the American Bar Association approves the enactment into law of H.R. 111 in the 82nd Congress which proposes to amend Section 633 of Title 28 of the United States Code so as to substitute for fees now paid United States Commissioners, other than National Park Commissioners, for specific services annual compensation at rates fixed from time to time by the Judicial Conference of the United States.
>
> RESOLVED, That the Standing Committee on Jurisprudence and Law Reform be authorized to advocate the passage of H.R. 111 by all appropriate means.

Mr. Adkins said that it seemed to be the consensus that the present fee system for United States Commissioners was antiquated and that H.R. 111 does provide a more reasonable system for the present-day practices.

The fourth recommendation of the Committee was against H.R. 4826 which seeks to prohibit bail in cases of conviction of espionage, treason, sedition or subversive activities. Mr. Adkins said that his Committee realized that the problem was serious, but felt that the matter might better be left to the discretion of trial judges rather than to approve legislation that might result in depriving defendants of their primary rights in many doubtful cases.

Tracy E. Griffin, of Washington, said that he doubted whether the members had had time to read the "brief" on Communist tactics prepared by the Committee To Study Communist Tactics and Objectives. He felt that the members of the House should have time to consider that before acting upon this resolution. On his motion, the House voted to defer action on the proposal until the Mid-Winter Meeting of the House.

The fifth resolution was as follows:

> RESOLVED, That the American Bar Association take no action in respect of a resolution submitted to the Board of Governors by Mr. George Washington Williams of Baltimore, Maryland, contemplating a constitutional amendment limiting the powers of the Federal Government with respect to laws and treaties conflicting with state laws, nationalization of labor, business, industry or the professions and other matters.

It was the feeling of the Committee, Mr. Adkins said, that no such constitutional amendment could ever be obtained. The House voted to adopt the Committee's resolution.

The next resolution would have placed the Association on record as favoring "appropriate procedure" to require appointees to the Federal Bench to have had an aggregate of at least ten years' experience either as a practicing lawyer or as a judge. A similar proposal recommended by the Committee was referred back to it at the February, 1950, meeting of the House on the ground that the language then proposed would have excluded persons fully qualified.

In reply to a question put by Chairman Willy, Mr. Adkins said that the resolution called for approval of the principle only and not for approval of specific legislation or a constitutional amendment. Chairman Willy said that he thought that the language went further than that. On motion of David F. Maxwell, of Pennsylvania, the House referred the resolution back to the Committee for further report at the Mid-Year Meeting.

The next resolution dealt with the question of a federal code of ethics. Bills setting up such a code had been referred to the Committee at the last meeting of the House. The Committee felt that such a code of ethics would be in conflict with the present Code of Professional Ethics and its resolution therefore recommended that the proposal be not approved.

John Kirkland Clark, of New York, said that some jurisdictions had not approved a code of ethics and that this might provide a code to guide federal district courts in such cases.

Edwin M. Otterbourg, of New York, said that he was in favor of the purpose of the resolution but felt that it was badly worded. "It puts us on record as being opposed to, in some way, the Supreme Court promulgating a Code of Ethics", he declared.

On motion of Mr. Clark, the resolution was referred back to the Committee for further study and report to the House.

The last resolution of the Jurisprudence and Law Reform Committee was as follows:

> RESOLVED, That the American Bar Association disapproves and opposes the enactment into law of H.R. 2393 in the 82nd Congress entitled "A Bill to Amend Title 28 of the United States Code to Authorize the Chief Justice of the United States to Assign Circuit Judges to Sit Upon the Supreme Court in the Place of any Justice Who Is Unable to Serve" and directs the Standing Committee on Jurisprudence and Law Reform to oppose its passage by all appropriate means.

The Committee and the Section of Judicial Administration had conferred on this matter, Mr. Adkins reported, and were agreed that the pending bill referred to in the resolution was unnecessary.

The House voted to adopt the resolution.

On Mr. Maxwell's motion, the House voted to continue the Washington Committee.

This session recessed at 2:45 P.M.

SIXTH SESSION

■ This last session was very short and only two affirmative actions were taken. One was on a resolution introduced by John W. Davis, of New York, calling upon the two major political parties to pledge themselves in their 1952 platforms to appointment of only the best qualified men to the federal Bench. The second was an expression of thanks to the lawyers of New York for their hospitality during the Annual Meeting.

■ The last session of the House convened at 9:30 A.M., Friday, September 21. Chairman Willy presided.

Kenneth C. Royall, of New York, Chairman of the Committee on Business and Legal Problems in Occupied and ECA Countries, gave his report. He recalled that his report last year covered France and England. This year's report dealt with Norway, Denmark, Sweden, Belgium, The Netherlands, Western Germany and Japan. He declared that the Committee felt that its work was finished and that it should not be continued. Chairman Willy ruled that the Committee automatically died and that no affirmative action was necessary to administer a *coup de grace*.

Chairman Willy said that nineteen resolutions had been introduced in the Assembly, which had been meeting concurrently with the House, only one of which had been adopted by the Assembly. Introduced in the Assembly by John W. Davis, of New York, it reads as follows:

WHEREAS, A qualified and independent judiciary is necessary for the maintenance of a coordinate branch of our Government and for the protection and the maintenance of individual freedom and rights; and

WHEREAS, The American Bar Association is in a position to give impartial and expert views to assist those responsible for the selection of our judges; and

WHEREAS, It is desirable in the interests of the people of this country that each of the two major parties shall, before election, pledge and state the policy that the party and its candidate for the presidency of this nation and its candidates for the Senate will follow with relation to the selection of judges, which policy shall include the principles hereinafter set forth,

NOW THEREFORE BE IT RESOLVED,

1. That the President of this Association appoint a special committee of not more than seven to call on the Platform Committee of each of the two major political parties at its National Convention in 1952 and request in behalf of this Association the adoption of a plank in its platform pledging itself and its candidate for President, and its candidates for the Senate to the following:

(a) That only the best qualified persons available shall be selected for appointment to judicial offices; and

(b) That the President before nominating and the Senate before confirming shall request the report and the recommendation of the Committee on Federal Judiciary of the American Bar Association.

On motion of Secretary Stecher, the House voted to concur in the action of the Assembly adopting the resolution.

Copies of the report of the Board of Governors had been distributed to members of the House. The report required no action by the delegates and, on motion of the Secretary, was received and filed.

Charles S. Rhyne, Chairman of the Committee on Draft, proposed the following resolution, which was adopted on his motion:

WHEREAS, The lawyers of New York, and their ladies, have individually and collectively extended the warmest of welcomes to the members of the American Bar Association and their families in attendance at this great annual convention, and to our distinguished guests from abroad; and

WHEREAS, This welcome was followed up with hospitality and entertainment unexcelled in the 73-year history of the American Bar Association;

NOW THEREFORE BE IT RESOLVED, That the American Bar Association does hereby record its thanks and appreciation to the seven host bar associations and to each and every member thereof and their ladies.

The business of the House had now been concluded and the members called upon Douglas Hudson, of Kansas, to answer charges of "fraud and deceit" which had been lodged against him for allowing himself to be re-elected to the House after announcing his retirement at the last meeting. The charges of "fraud and deceit" had been made to lighten the atmosphere after a week of hard work. Perhaps the final paragraph of Mr. Hudson's answer deserves quotation: "Frankly, I have been in associations in war, in the Marine war; I have associated in the state legislature of our state. There is a camaraderie which exists in this House of Delegates which is akin to the camaraderie between men who serve their country in time of war, a rich, warm, fine affection which I am going to miss."

Chairman Willy replied that the House hoped that it would have a farewell speech from him every year.

The House adjourned sine die at 9:55 A.M.

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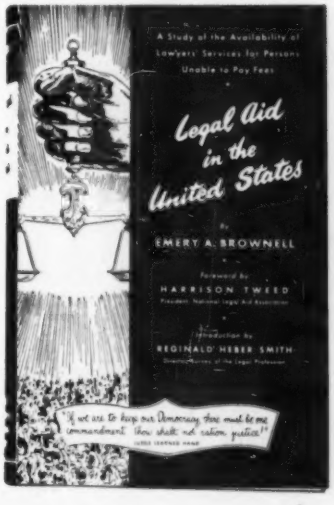

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